161 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Guttman Energy, Inc., d/b/a Guttman Oil Company, PBF Holding Company, LLC	Docket Nos. OR14-4-000 OR14-4-001

v.

Buckeye Pipe Line Company, L.P.
Laurel Pipe Line Company, L.P.

OPINION NO. 558

ORDER ON INITIAL DECISION

(Issued November 16, 2017)

OPINION NO. 558

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1. This order addresses briefs on and opposing exceptions to an Initial Decision[1] issued on April 19, 2016. The Initial Decision addressed a challenge to Buckeye Pipe Line Company, L.P.'s (Buckeye) market-based rate authority in the destination markets of Harrisburg and Pittsburgh, Pennsylvania and the origin market of Chelsea Junction, Pennsylvania, as well as whether Buckeye has been unlawfully charging interstate tariff rates for intrastate shipments. As discussed below, the Commission affirms the Presiding Administrative Law Judge's (Presiding Judge) finding that the essential character of the movements in question is interstate and affirms in part and reverses in part the Presiding Judge's findings regarding market power.

I. General Background

A. Parties

2. The Complainants in this proceeding are Guttman Energy, Inc., d/b/a Guttman Oil Company (Guttman) and PBF Holding Company LLC (PBF) (collectively, the Complainants). PBF is a refiner and marketer of petroleum products and is a supplier of such products to Guttman. Guttman is a marketer and distributor of refined petroleum products and is a contract purchaser of such products from PBF.[2]

3. The respondents in this proceeding were initially Buckeye and Laurel Pipe Line Company, L.P. (Laurel) (collectively, the Carriers). The Carriers are subsidiaries of Buckeye Partners, LP and transport petroleum and refined petroleum products through pipelines.[3] As explained below, Laurel was subsequently dismissed as a respondent.

B. Procedural History

4. On October 15, 2013, the Complainants filed a Complaint[4] against the Carriers pursuant to the Interstate Commerce Act (ICA).[5] The Complainants alleged that the Carriers were charging Guttman interstate rates for intrastate transportation from

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[1] *Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P., et al.*, 155 FERC ¶ 63,008 (2016) (Initial Decision).

[2] *Id.* PP 5-6, 82-84.

[3] *Id.* P 7.

[4] Complaint of Guttman Energy, Inc., d/b/a Guttman Oil Company and PBF Holding Company LLC, Docket. No. OR14-4-000 (Oct. 15, 2013) (Complaint).

[5] 49 U.S.C. app. § 1 *et seq.* (1998).

Chelsea Junction to destinations in Pennsylvania and that the Carriers were discriminating by charging higher rates for interstate service than for identical intrastate service. The Complainants further asserted that Buckeye has significant market power in certain markets for which Buckeye has market-based rate authority.[6]

5. On November 4, 2013, Buckeye and Laurel filed separate motions to dismiss and answers to the Complaint. Laurel asserted that Laurel should be summarily dismissed as a respondent because it does not provide interstate transportation and is not subject to the Commission's jurisdiction. Laurel represented that its intrastate rates are regulated by the Pennsylvania Public Utility Commission.[7] Buckeye denied all allegations of unlawfulness and argued that the Commission should dismiss the claim that Guttman's shipments are intrastate as a matter of law.[8]

6. On May 2, 2014, the Commission issued an order dismissing the Complaint against Laurel and the discrimination claims against Buckeye, finding Guttman's movements to be interstate transportation, and establishing a hearing to examine whether Buckeye possesses market power in Harrisburg, Pittsburgh, and Chelsea Junction, Pennsylvania.[9]

7. On June 2, 2014, the Complainants filed a request for rehearing and clarification of the Hearing Order. The Complainants requested rehearing of the Commission's determination that Buckeye properly charged Guttman its interstate rate and clarification that the scope of the hearing included both market power and cost-of-service issues regarding the justness and reasonableness of Buckeye's rates. On November 6, 2014, the Commission issued an order on rehearing and establishing hearing.[10] The order established a hearing as to "whether the Complainants' shipment should be considered interstate or intrastate transportation,"[11] and denied the Complainants' request for

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[6] Complaint at 1-2.

[7] Laurel Motion to Dismiss and Answer at 4.

[8] Buckeye Motion to Dismiss and Answer at 4.

[9] *Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P., et al.*, 147 FERC ¶ 61,088 (2014) (Hearing Order).

[10] *Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P., et al.*, 149 FERC ¶ 61,103 (2014) (Rehearing Order).

[11] *Id.* P 9.

rehearing and clarification as to the scope of the market power issue.[12] The jurisdictional issue regarding Guttman's shipments was subsequently consolidated into the ongoing hearing proceeding regarding Buckeye's market-based rates.[13]

8. The hearing was held from September 29, 2015 to October 19, 2015.[14] The parties and Trial Staff filed initial post-hearing briefs on December 11, 2015, and post-hearing reply briefs on January 19, 2016.[15]

9. The Presiding Judge issued the Initial Decision on April 19, 2016. Regarding the jurisdictional issues, the Presiding Judge found that Guttman bears the burden of proof,[16] that the essential character of Guttman's shipments is interstate,[17] and that the issue of whether the Complainants are entitled to refunds or reparations if the movements are intrastate is moot.[18] As to the market power issues, the Presiding Judge concluded that the Complainants had not met their burden of proof regarding the claims that Buckeye possesses significant market power in the Chelsea Junction origin market[19] and the Pittsburgh destination market,[20] but found that the Complainants and Trial Staff had met their burden as to the claim that Buckeye possesses significant market power in the Harrisburg destination market.[21] The Presiding Judge recommended that Buckeye's market-based rate authority for the Harrisburg destination market be revoked.[22]

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[12] *Id.* P 14.

[13] *Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P., et al.*, 149 FERC ¶ 63,014 (2014).

[14] Initial Decision, 155 FERC ¶ 63,008 at P 43.

[15] *Id.* PP 49-50.

[16] *Id.* PP 53-55.

[17] *Id.* PP 128, 134.

[18] *Id.* P 135.

[19] *Id.* P 481.

[20] *Id.* P 486.

[21] *Id.* P 491.

[22] *Id.* P 492.

10. On May 19, 2016, the Complainants and Buckeye each filed a Brief on Exceptions. On June 13, 2016, the parties and Trial Staff filed Briefs Opposing Exceptions. On exceptions, the parties challenge the Presiding Judge's findings as discussed below.

II. Discussion

11. As discussed below, the Commission affirms the Presiding Judge's determinations as to the jurisdictional issue and affirms in part and reverses in part the Presiding Judge's determinations regarding market power.

A. Jurisdictional Issues

12. The Presiding Judge found that Guttman's shipments are properly classified as interstate.[23] On exceptions, the Complainants argue that the Presiding Judge erred in finding that in-state transportation by Guttman of products received from PBF at Chelsea Junction is interstate in character. As discussed below, the Commission affirms the Presiding Judge's holding that the shipments are interstate.

1. Background on the Laurel/Buckeye System

13. The Laurel pipeline provides intrastate transportation services between the Philadelphia and Pittsburgh areas of Pennsylvania subject to regulation by the Pennsylvania Public Utility Commission. Buckeye leases pipeline capacity from Laurel

[23] *Id.* P 128.

to provide interstate transportation services.[24] The Laurel/Buckeye system receives refined petroleum products from Sunoco Logistics at Chelsea Junction, Pennsylvania; Eagle Point, New Jersey; and Girard Point, Pennsylvania. The system also receives products from Colonial Pipeline Company (Colonial) at Booth Pump Station, Pennsylvania. Products from Chelsea Junction, Eagle Point, and Girard Point flow through the Booth Pump Station, where product from Colonial is also accepted and all volumes are available for delivery to downstream points in Pennsylvania.[25]

14. PBF is an independent refiner and marketer of petroleum products. Through its subsidiaries, PBF owns and operates petroleum refineries at Delaware City, Delaware; Paulsboro, New Jersey; and Toledo, Ohio.[26] PBF supplies its customers with petroleum products produced at its refineries and with petroleum products obtained by purchase or exchange from other refiners or marketers.[27]

15. Guttman is an independent distributor and marketer of refined petroleum products serving commercial, wholesale, and retail markets. Guttman purchases a portion of its refined petroleum product supply from PBF. Guttman and PBF are not affiliates.[28]

16. In July of 2013, PBF assumed the rights and obligations under a contract for the sale of petroleum products to Guttman for delivery at the receipt point of Laurel located at Chelsea Junction, Pennsylvania. Pursuant to the contract, title and risk of loss pass from PBF to Guttman as the product passes the flange of the meter measuring receipt at the intake to Laurel pipeline. The contract requires PBF to supply a certain volume of product at the Chelsea Junction receipt point each month. The contract does not require PBF to source the products from its Delaware City Refinery and its supply obligation would not be affected if that refinery shut down. PBF is not obligated under the supply contract to inform Guttman of the origin of its products delivered at Chelsea Junction and Guttman has no involvement in the sourcing of such products. Guttman also has no obligation to inform PBF of the final destinations of the product and does not do so. PBF arranges and pays for transportation of the product to Chelsea Junction on pipelines

[24] The pipeline facilities over which Laurel and Buckeye provide transportation services will be referred to as the Laurel/Buckeye system.

[25] *Id.* PP 81, 98; Complainants Brief on Exceptions at 7.

[26] Complainants Brief on Exceptions at 7; Ex. GP-43 at 3.

[27] Initial Decision, 155 FERC ¶ 63,008 at P 82; Ex. GP-46 at 1-2.

[28] Initial Decision, 155 FERC ¶ 63,008 at P 83; Complainants Brief on Exceptions at 8; Ex. GP-43 at 6-7; Ex. GP-50 at 3-4.

not affiliated with Buckeye and Laurel. The transportation does not involve any joint or through tariff to delivery points beyond Chelsea Junction. Guttman is the shipper of record for PBF products shipped from Chelsea Junction to downstream delivery points in Pennsylvania and pays those charges.[29]

17. All shippers on the Laurel/Buckeye system make their nominations through the Transport 4 (T-4) portal, which maintains information such as scheduling, nominations, and inventory. Shippers must enter certain information in the T-4 system by the 15th day of the month preceding the month in which shipment is scheduled. Before the shipment is lifted by Buckeye or Laurel, the shipper must provide the origin tanker, which informs Buckeye of where the shipment originates.[30] PBF is not involved in the nomination, scheduling, or payment for shipments of PBF product by Guttman on the Laurel/Buckeye system.[31] The T-4 system does not provide PBF with information regarding the final destinations to which Guttman will distribute products.[32]

18. Chelsea Junction has three active tanker codes.[33] Guttman designates the origin tanker for Guttman's shipments of PBF products from Chelsea Junction as "SPL."[34] Products designated as "SPL" originate at Delaware City. The tanker facility is physically connected to the pipelines between Delaware City, Delaware and Chelsea Junction, Pennsylvania.[35] The volumes are transported on the Delaware Pipeline

[29] Initial Decision, 155 FERC ¶ 63,008 at PP 84-86, 91; Complainants Brief on Exceptions at 8-13; Ex. GP-43 at 7-13; Ex. GP-50 at 4-7.

[30] Initial Decision, 155 FERC ¶ 63,008 at PP 86, 92, 99, 112; Ex. BPL-43 at 17, 20; Ex. GP-70 at 3. The term "tanker" means the connecting facility where the shipper's commodities are being originated from (Receipt Tanker) or delivered to (Delivery Tanker).

[31] Initial Decision, 155 FERC ¶ 63,008 at P 91; Ex. GP-50 at 6.

[32] Initial Decision, 155 FERC ¶ 63,008 at P 86; Complainants Brief on Exceptions at 11; Ex. GP-43 at 10.

[33] Initial Decision, 155 FERC ¶ 63,008 at P 92; Ex. BPL-43 at 31-32.

[34] Initial Decision, 155 FERC ¶ 63,008 at P 92; Ex. BPL-43 at 28.

[35] Initial Decision, 155 FERC ¶ 63,008 at P 92; Complainants Brief on Exceptions at 14; Ex. BPL-43 at 18-19.

Company system and Sunoco Logistics system to Chelsea Junction and then on the Laurel/Buckeye system for delivery to downstream locations in Pennsylvania.[36]

19. The interconnection between Sunoco Logistics and the Laurel/Buckeye system does not involve any tanks or merchant storage.[37] Product received at Chelsea Junction for transportation on the Laurel/Buckeye system, including PBF product, moves through breakout storage in Buckeye's tank farm at Booth, Pennsylvania, located downstream of Chelsea Junction. The breakout storage is used for operational purposes.[38] Product moving from PBF's Delaware City Refinery on the Laurel/Buckeye system does not enter merchant or leased storage.[39] Guttman's shipments on the Laurel/Buckeye system include PBF product commingled with product from other shippers and from sources other than Delaware City.[40] Buckeye classifies Guttman's shipment of PBF products from Chelsea Junction as interstate, subject to Buckeye's interstate rates instead of Laurel's intrastate rates.[41]

2. Initial Decision

20. The Presiding Judge found that the determination of interstate versus intrastate jurisdiction "must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."[42] The Presiding Judge stated that the Commission has looked for indications that are "sufficient to establish that the continuity of transportation

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[36] Initial Decision, 155 FERC ¶ 63,008 at PP 100, 109; Complainants Brief on Exceptions at 11-13; Ex. BPL-43 at 28; Ex. S-1 at 11.

[37] Initial Decision, 155 FERC ¶ 63,008 at P 110; Ex. S-1 at 11-13; Ex. BPL-52 at 21-22.

[38] Initial Decision, 155 FERC ¶ 63,008 at PP 89, 110; Complainants Brief on Exceptions at 12; Ex. GP-56 at 1; Ex. BPL-43 at 8, 10-11; Ex. S-1 at 11; Tr. 336 (Gerbman).

[39] Initial Decision, 155 FERC ¶ 63,008 at P 110; Complainants Brief on Exceptions at 49; Tr. 332-338, 343 (Gerbman).

[40] Initial Decision, 155 FERC ¶ 63,008 at PP 89, 110; Complainants Brief on Exceptions at 12 (citing Ex. GP-56 at 1); Ex. BPL-43 at 8, 10; Tr. 336.

[41] Initial Decision, 155 FERC ¶ 63,008 at P 100; Ex. BPL-43 at 31.

[42] Initial Decision, 155 FERC ¶ 63,008 at P 73 (quoting *Atlantic Coast Line R. Co.*

has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased."[43]

21. The Presiding Judge explained that the fact most relied on in determining the essential character of the commerce is the fixed and persisting intent of the shipper at the time of the shipment.[44] The Presiding Judge further explained that the Commission has applied the following criteria for analyzing a shipper's intent to ship in intrastate commerce despite the fact that there might be a component of the transportation that is interstate in nature:

(1) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage;

(2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated; and

(3) transportation in furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage.[45]

22. The Presiding Judge observed that the Commission has found that proof of these criteria was sufficient to establish that the continuity of transportation was broken, and that the initial shipments had come to rest, and that the interstate journey had ceased. The Presiding Judge noted that the Commission has also considered the following other factors: the character of the billing; change of ownership during transportation; knowledge or lack thereof on the part of the consignor as to the ultimate destination; the character and length of the transaction occurring at the point at which the transportation is interrupted; the power of the commodity owner to divert the shipment after the initial

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v. Standard Oil Co., 275 U.S. 257, 268 (1927) (*Atlantic Coast*)).

[43] *Id.* (quoting *Interstate Energy Co.*, 32 FERC ¶ 61,294, at 61,690 (1985) (*Interstate Energy*)).

[44] *Id.* P 74; *see also* Hearing Order, 147 FERC ¶ 61,088 at P 25 ("whether a shipment is interstate in nature depends on the intent of the shipper at the time the initial interstate transportation commences").

[45] *Id.* (citing *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at 61,207 (1981) (*Northville*) (citing *Determination of Jurisdiction Over Transp. of Petroleum and Petroleum Products By Motor Carriers Within a Single State*, 71 M.C.C. 17, at 29 (1957) (*Petroleum Products*))).

movement begins; breaking of bulk; and commingling. The Presiding Judge explained that no single factor is determinative as to the essential character of the shipment.[46]

23. The Presiding Judge also explained that transportation by a pipeline occurring entirely within a single state is properly characterized as interstate if it acts as part of a larger, continuous interstate movement. The Presiding Judge noted that in *Texaco* the Commission stated that "all interstate movements are jurisdictional unless the facts show a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate" and "storage by itself is not an indicia of purely intrastate movement."[47]

24. The Presiding Judge rejected the Complainants' assertion that when a cross-border movement is followed by a within-state movement, the shipper on the initial cross-border segment must intend that the downstream within-state carrier deliver the goods to particular points to be considered interstate. The Presiding Judge concluded that while the intent of a shipper on an initial cross-border segment can be a factor, it is not by itself determinative.[48]

25. The Presiding Judge held that the essential character of the commerce in this case is interstate. The Presiding Judge found that no facts in the record supported a finding that Guttman lacks a fixed intent to make interstate shipments when it moves product along the Laurel/Buckeye system. The Presiding Judge determined that the Complainants failed to establish that the "continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased."[49]

26. The Presiding Judge found that before transportation commences, both the Complainants and Buckeye know that the product originates from Delaware City and that all volumes will be delivered to Pennsylvania.[50] The Presiding Judge concluded that the evidence in the record demonstrates PBF is aware of the ultimate destinations of the

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[46] *Id.*

[47] *Id.* P 75 (quoting *Texaco Refining and Marketing, Inc. v. SFPP, L.P., et al.*, 80 FERC ¶ 61,200, at 61,805-61,806 (1997) (*Texaco*)).

[48] *Id.* P 79.

[49] *Id.* P 128 (quoting *Interstate Energy*, 32 FERC at 61,690).

[50] *Id.* P 129 (citing Tr. 229-232, 269-270 (Quarto)).

movements.[51] The Presiding Judge also pointed out that PBF's professed lack of knowledge of the destinations is not determinative that the transportation is intrastate in nature. The Presiding Judge found that Guttman's acceptance of product sourced in Delaware and entry of SPL as the origin tanker demonstrates Guttman's intent that the product move from Delaware to Pennsylvania, and the facts do not support a finding that the interstate journey is broken.[52]

27. On exceptions, the Complainants challenge these holdings as discussed below. Buckeye and Trial Staff urge the Commission to affirm the Initial Decision.

3. Briefs on Exceptions

28. The Complainants argue that the Presiding Judge erred in finding that Guttman's shipments of product received from PBF at Chelsea Junction, Pennsylvania to Pennsylvania destinations is interstate in character.[53] The Complainants assert that the Presiding Judge applied an erroneous shipper intent test and gave no weight to certain factors established by the Commission for determining the jurisdictional status of in-state transportation of products received from another state.[54]

a. The Complainants' Claim that the Presiding Judge Applied an Erroneous Shipper Intent Test

29. The Complainants argue that the Presiding Judge adopted an erroneous shipper intent test.[55] The Complainants assert that the most important factor for determining the essential character of the movement is the fixed and persisting intent of the shipper at the time of the shipment.[56] The Complainants argue that this shipper intent test requires that PBF have knowledge or intent with respect to delivery of the product to specific final

[51] *Id.* PP 129-130.

[52] *Id.* P 130.

[53] Complainants Brief on Exceptions at 25, 33.

[54] *Id.* at 33-34.

[55] *Id.* at 37-43.

[56] *Id.* at 37 (citing *Northville*, 14 FERC at 61,207; Hearing Order, 147 FERC ¶ 61,088 at P 25).

destinations in order for the movement to be considered interstate.[57] The Complainants assert that the Presiding Judge improperly found that because the Laurel/Buckeye system has a limited number of delivery points and there are no off-pipeline sales at Chelsea Junction or Booth, the shipper intent test does not require knowledge of specific destinations.[58]

30. The Complainants rely on the following language from the Supreme Court's decision in *Baltimore v. Settle*:

> The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not deemed to be part of it, even though some further shipment was contemplated when the original movement began.[59]

31. The Complainants also claim that several decisions support their description of the shipper intent test. The Complainants state that in *Atlantic Coast*, the Supreme Court focused on the water carriers' lack of knowledge and intent with respect to final destinations reached through inland transportation after the vessels delivered the shipments onshore.[60] The Complainants state that the Court ruled that mere knowledge that oil will be shipped to destinations beyond the initial receipt point in a state does not establish continuity of interstate transportation.[61] The Complainants claim that in *Petroleum Products*, the Interstate Commerce Commission ruled that truck movements were intrastate where no designated ultimate destinations were known at the time the products left the initial ports of origin for pipeline or water movements and no particular

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[57] *Id.* at 40-43.

[58] *Id.* at 40-41.

[59] *Baltimore & Ohio Southwestern Railway Company v. Settle*, 260 U.S. 166, 173 (1922) (*Baltimore v. Settle*); Complainants Brief on Exceptions at 38.

[60] Complainants Brief on Exceptions at 38-39 (citing *Atlantic Coast*, 275 U.S. at 267).

[61] *Id.* at 41 (citing *Atlantic Coast*, 275 U.S. at 267-270).

quantities were shipped against specific orders.[62] The Complainants state that in *Northville*, this Commission found that in-state transportation of oil delivered to a state by water was intrastate in character where the water carriers had no instructions except to deliver cargo to the designated port, and no further destination was arranged with the water carriers.[63]

b. The Complainants' Claim that the Presiding Judge Improperly Applied the Shipper Intent Test and Failed to Give Weight to Certain Factors Relevant to the Jurisdictional Analysis

32. The Complainants argue that the Presiding Judge gave no weight to criteria and factors that have been identified by the Commission as evidence that within-state transportation is intrastate, relying primarily on the Commission's decision in *Northville*.[64]

33. The Complainants claim that the Presiding Judge failed to give weight to the fact that PBF lacks knowledge or intent with respect to the actual final destinations to which Guttman will ship the product.[65] The Complainants claim that instead of considering PBF's lack of knowledge of the ultimate destinations, the Presiding Judge improperly relied on the facts that the Laurel/Buckeye system has a limited number of delivery points, the absence of off-pipeline sales at Chelsea Junction or Booth, and Guttman's knowledge that the products have been received from another state.[66]

34. The Complainants also argue that the Presiding Judge incorrectly found that PBF has knowledge of the final destination of the products. The Complainants assert that the Presiding Judge improperly relied on invoices submitted by Guttman after the transportation is completed to find that PBF had knowledge of the particular destination to which Guttman will distribute the products at the time PBF initiates the original transportation.[67] The Complainants further state that it is impossible for PBF to know the

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[62] *Id.* at 39 (citing *Petroleum Products*, 71 M.C.C. 17 at 20).

[63] *Id.* at 39-40 (citing *Northville*, 14 FERC at 61,206-61,209).

[64] 14 FERC ¶ 61,111.

[65] Complainants Brief on Exceptions at 18, 37-43.

[66] *Id.* at 40-42.

[67] *Id.* at 41-42.

specific final destinations because Guttman can change the destinations for shipments after they leave Delaware City, and even after they leave Chelsea Junction.[68]

35. The Complainants argue that the Presiding Judge failed to give any weight to the fact that PBF does not ship products from Delaware City to fill any specific order for a specific quantity of a given product to be moved through to a specific destination beyond Chelsea Junction. The Complainants claim that this satisfies the first criterion for intrastate shipment established in *Northville* that at the time of shipment, there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage.[69]

36. The Complainants assert that the Presiding Judge failed to give any weight to the fact that Chelsea Junction is a distribution point from which specific products are allocated and sold by Guttman.[70] The Complainants argue this satisfies the second criterion stated in *Northville* that the terminal storage is a distribution point or local marketing facility from which specific amounts of product are allocated and sold.[71]

37. The Complainants claim that the Presiding Judge failed to give any weight to the fact that Guttman is able to, and sometimes does, rearrange destinations after shipments have left Chelsea Junction.[72] The Complainants argue this satisfies the third *Northville* criterion, which is the arrangement of transportation in furtherance of distribution in a single state after sale or allocation from storage.[73]

38. The Complainants argue that the Presiding Judge failed to give any weight to the fact that the billing for transportation by PBF and Guttman is separate and local, and no joint or through tariffs are involved in the transportation.[74] The Complainants argue this satisfies the factor identified in *Northville* of whether the billing is local or through.[75]

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[68] *Id.*

[69] Complainants Brief on Exceptions at 34 (citing *Northville*, 14 FERC ¶ 61,111).

[70] *Id.* at 35-36.

[71] *Id.* at 35.

[72] *Id.* at 36-37.

[73] *Id.* at 36.

[74] *Id.* at 43-45.

[75] *Id.* at 43 (citing *Northville*, 14 FERC ¶ 61,111).

The Complainants claim that the Presiding Judge declined to give weight to the local billing because it is based on the commercial arrangement of the parties.[76]

39. The Complainants assert that the Presiding Judge failed to give any weight to the fact that the title and risk of loss pass from PBF to Guttman at Chelsea Junction.[77] The Complainants state that this satisfies the factor identified in *Northville* of whether there is a change of ownership during the course of transportation.[78] According to the Complainants, the Presiding Judge declined to take into account the change in ownership because the point for transfer of title is chosen by PBF and Guttman, and the transfer of title occurs while the product remains in transportation.[79] The Complainants argue that the form of the contract is one of the circumstances tending to show the essential character of the transportation,[80] and a change of ownership while product remains in transportation is precisely what is contemplated by *Northville*.[81]

[76] *Id.* at 44 (citing Initial Decision, 155 FERC ¶ 63,008 at P 131).

[77] *Id.* at 45-46.

[78] *Id.* at 45 (citing *Northville*, 14 FERC ¶ 61,111).

[79] *Id.* (citing Initial Decision, 155 FERC ¶ 63,008 at P 131).

[80] *Id.* at 46 (citing *Atlantic Coast*, 275 U.S. at 268).

[81] *Id.* at 45-46 (citing *Northville*, 14 FERC at 61,208 (referring to a "change of ownership during the course of transportation")).

40. The Complainants assert that the Presiding Judge failed to give any weight to the fact that PBF lacks knowledge of the final destination or consignees to which Guttman will deliver products. The Complainants state that separate from the shipper intent issue, the Commission also considers the knowledge or lack of knowledge on the part of the consignor of the ultimate destination or consignees under *Northville*.[82]

41. The Complainants assert that the Presiding Judge failed to give any weight to the fact that PBF lacks intent to ship products to any specific destination, consistent with another *Northville* factor which considers the intent of the consignor with reference to the final destination.[83]

42. The Complainants assert that the Presiding Judge failed to give any weight to the *Northville* factor that considers the breaking of bulk and the commingling of the commodity shipped with other shipments of the same commodity.[84] The Complainants assert that both breaking of bulk and commingling occurs.[85] The Complainants argue that the Presiding Judge discusses breakout storage, but not does not mention breaking of bulk. The Complainants describe breaking of bulk as the breaking down of bulk shipments into smaller shipments that can be distributed to multiple delivery points.[86]

43. The Complainants further argue that the Presiding Judge's reliance on the absence of merchant storage or leased storage is misplaced. The Complainants assert that the presence or absence of merchant storage is not a factor from *Northville*, and the Initial Decision lacks any precedent for treating merchant storage as a factor. The Complainants claim that, in any event, the commercial function of product handling at Chelsea Junction and Booth is similar to the commercial function of merchant storage because PBF products received at Chelsea Junction are placed into tankage at Booth, from which smaller shipments are subsequently drawn down for delivery to multiple final destinations determined by Guttman.[87]

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[82] *Id.* at 46-47 (citing *Northville*, 14 FERC ¶ 61,111).

[83] *Id.* at 47 (citing *Northville*, 14 FERC ¶ 61,111).

[84] *Id.* at 48.

[85] *Id.* (citing Ex. GP-70 at 3-4; Tr. 233-34 (Quarto)).

[86] *Id.* at 48-49.

[87] *Id.* at 49.

44. The Complainants assert that the Presiding Judge failed to give any weight to the *Northville* factor regarding the power of the owner of the property to divert shipments after the initial movement has begun.[88] The Complainants argue that this factor is met because delivery points specified by Guttman in a nomination can be changed and sometimes are changed by Guttman, changes in the destinations for individual batches are also allowed and do occur, and destinations for shipments of PBF products can be changed by Guttman after bulk shipments have left Delaware City and even after smaller shipments have left Chelsea Junction.[89]

45. The Complainants assert that the Presiding Judge failed to give any weight to the *Northville* factor of the general practices prevailing in a particular industry or trade. The Complainants argue that their arrangement is consistent with industry practice for customers to take delivery of products at Chelsea Junction. The Complainants also state that Guttman's business practice is to take delivery of product from suppliers at Chelsea Junction for distribution to downstream delivery points.[90]

46. The Complainants argue that the Presiding Judge failed to give any weight to evidence that Buckeye's test for classifying shipments by Guttman does not consider the jurisdictional criteria and factors established by the Commission, such as PBF's lack of knowledge or intent of the final destinations, the presence of separate billing, the change in product ownership, and the breaking of bulk shipments and commingling. Instead, the Complainants state that Buckeye relies on the out-of-state source of product as the single and exclusive test for interstate jurisdiction.[91] The Complainants argue that this is inconsistent with decisions where it was known that products transported within a state were received from another state, but the in-state transportation was found to be intrastate in character.[92] The Complainants further argue that Buckeye could apply their understanding of the *Northville* criteria and factors to Guttman's shipments without the need for consultation or investigation.[93]

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[88] *Id.* at 50-51.

[89] *Id.* at 51 (citing Ex. GP-70 at 3-4; Tr. 233-34).

[90] *Id.* at 52-53.

[91] *Id.* at 53-54.

[92] *Id.* at 55 (citing *Atlantic Coast*, 275 U.S. 257; *Northville*, 14 FERC ¶ 61,111; and *Petroleum Products*, 71 M.C.C. 17).

[93] *Id.* at 56.

47. Finally, the Complainants assert that because the Presiding Judge's jurisdictional finding is erroneous, the failure to consider the issue of reparations is also erroneous. The Complainants claim that Guttman is entitled to reparations as a result of Buckeye's collecting the interstate rates from Guttman, rather than collecting Laurel's intrastate rates.[94]

4. Briefs Opposing Exceptions

48. Buckeye and Trial Staff support the Presiding Judge's finding that Guttman's shipments are interstate.[95] Buckeye and Trial Staff assert that the record supports the Presiding Judge's conclusion that the essential character of the movement is interstate because the product never comes to rest. They argue that without a sufficient break in the movement, intrastate transportation cannot begin.[96] Buckeye and Trial Staff argue that without facts showing that the continuity of transportation has been broken, an analysis of the additional factors and criteria listed in *Northville* is unnecessary.[97] They also assert that the Presiding Judge was not required to assess each criterion and factor individually.[98] They contend that adopting the Complainants' position regarding the jurisdictional test would "have significant and far reaching consequences"[99] and would "render the boundary between Federal and state jurisdiction over oil pipelines essentially meaningless."[100] Buckeye and Trial Staff also support the Presiding Judge's finding that the Complainants knew that the product originated in Delaware City and that all volumes will be delivered to Pennsylvania destinations.[101] In addition, Buckeye argues that the

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[94] *Id.* at 56-67.

[95] Buckeye Brief Opposing Exceptions at 4-5; Trial Staff Brief Opposing Exceptions at 88.

[96] Trial Staff Brief Opposing Exceptions at 88-89, 91-94; Buckeye Brief Opposing Exceptions at 4-5, 7-9.

[97] Trial Staff Brief Opposing Exceptions at 89-90; Buckeye Brief Opposing Exceptions at 5, 9, 12-13.

[98] Trial Staff Brief Opposing Exceptions at 93, 95; Buckeye Brief Opposing Exceptions at 9 n.16.

[99] Buckeye Brief Opposing Exceptions at 25-26.

[100] Trial Staff Brief Opposing Exceptions at 96.

[101] *Id.* at 95; Buckeye Brief Opposing Exceptions at 10-14.

Complainants misconstrue or mischaracterize the facts in an effort to make the *Northville* criteria fit this proceeding,[102] Buckeye's method for classifying transportation meets its obligations under the ICA,[103] and the Presiding Judge correctly determined that the Complainants are not entitled to reparations for the difference between Buckeye's interstate rate and Laurel's intrastate rate.[104]

5. Commission Determination

a. The Presiding Judge Correctly Applied the Commission's Jurisdictional Analysis

49. Whether a movement is interstate or intrastate for purposes of ICA jurisdiction "depends upon the essential character of the movement"[105] and is determined based on a fact-specific analysis.[106] One of the main factors relied on to determine the essential character of the movement is "the fixed and persisting intent of the shipper, or the one for whose benefit the shipment is made."[107] The Commission ascertains shipper intent based

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[102] Buckeye Brief Opposing Exceptions at 12-22.

[103] *Id.* at 23-24.

[104] *Id.* at 26.

[105] *Baltimore v. Settle*, 260 U.S. at 170; *see also Atlantic Coast*, 275 U.S. at 268 ("The question of whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."); *U.S. v. Erie R. Co.*, 280 U.S. 98, 101-102 (1929) ("[T]he nature of the shipment is not dependent upon the question when or to whom the title passes. It is determined by the essential character of the commerce.") (internal citations omitted).

[106] *Texaco*, 80 FERC at 61,804 ("The determination of jurisdiction under the ICA depends on the specific facts of the individual case."); *see also Atlantic Coast*, 275 U.S. at 268-269 ("[T]he determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it").

[107] *Northville*, 14 FERC at 61,208 (quoting *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397, at 407 (1977)); *see also Interstate Energy*, 32 FERC at 61,690 ("In determining whether a transaction is interstate in character, the courts have held that one of the most important factors is the transportation intent of the shipper at the time the shipment commences its journey.") (citing *Atlantic Coast*, 275 U.S. 257 and *Baltimore v. Settle*, 260 U.S. 166).

on the specific facts and circumstances of the case.[108] In addition, the Commission presumes that "all interstate movements are jurisdictional unless the facts show a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate."[109]

50. As Trial Staff correctly notes, the criterion listed in *Northville* "look to the factual nature of the break in transportation as indicia of a shipper's intent, or more precisely lack thereof, to continue the movement beyond storage as part of a larger, interstate movement."[110] A sufficient break in interstate transportation may be shown if the product comes to rest at a terminal, storage facility, or distribution point, and –

> (1) [a]t the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage.[111]

51. These criteria may indicate that the interstate journey has ceased at the interruption point such that the shipper does not have a fixed and persisting intent to move product to

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[108] *Armstrong World Indus., Inc., Transp. Within Texas*, 2 I.C.C. 2d 63, at 69 (1986) (the shipper's intent "is ascertained from all the facts and circumstances surrounding the transportation"), *aff'd*, *State of Tex. v. U.S.*, 866 F.2d 1546 (5th Cir. 1989).

[109] *Texaco*, 80 FERC at 61,805.

[110] Trial Staff Brief Opposing Exceptions at 90.

[111] *Interstate Energy*, 32 FERC at 61,690 (noting that these criteria "are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased") (quoting *Petroleum Products*, 71 M.C.C. 17 at 29); *see also Texaco*, 80 FERC at 61,804 (noting that "the courts, the Interstate Commerce Commission, and this Commission have held that jurisdiction may not attach when the continuity of interstate transportation ends at a terminal or storage facility so that some portion of the transportation can be considered intrastate").

the ultimate destinations, and the subsequent movement beyond the point of interruption is not part of the larger interstate journey.[112]

52. On the other hand, if, at the time the shipment commences its journey and thereafter, there is a fixed and persisting intent on the part of the shipper, or the one for whose benefit the shipment is made, to move oil to an out-of-state or foreign destination and that intention is carried out, the transportation may be considered interstate commerce notwithstanding that the journey takes place in stages with an intermediate stopover.[113] In these cases, the Commission has looked to facts indicating that the movements before and after the interruption point form part of a larger, continuous interstate movement, particularly whether the shipper had a fixed and persisting intent to move the product through the intermediate point to the ultimate destination. When making this fact-intensive determination, in addition to the above criteria,[114] the Commission may consider "commingling in transit and in storage, processing before

[112] *See, e.g.*, *Atlantic Coast*, 275 U.S. at 269 (finding the continuity of interstate and foreign transportation was broken by seaboard storage stations that were used to hold oil for convenient distribution in-state such that there was "neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation"); *Northville*, 14 FERC at 61,209 (finding that there was no through movement oil where storage facilities were used to "maintain inventory" and "drawn upon as customer demand dictates"); *Interstate Energy*, 32 FERC at 61,691 (finding that the continuity of interstate transportation was broken at a terminal and storage facility that was used to meet the inventory needs of shippers).

[113] *See, e.g.*, *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397 at 408 (finding that pipeline transportation to McGuire Air Force Base in New Jersey was interstate despite an intermediate stopover at a terminal storage facility at Jacksonville, New Jersey); *Baltimore v. Settle*, 260 U.S. at 169-171 (finding that shipments of lumber by rail from out-of-state origins to Oakley, Ohio followed by reshipment within a few days to Madisonville, Ohio was interstate transportation despite the intermediate stopping place at Oakley); *Iron and Steel Articles from Wilmington, N.C. to Points in N.C. via General Motor Lines, Inc.*, 323 I.C.C. 740, at 743-744 (1965) (trucking shipments from Wilmington, North Carolina to final destinations in North Carolina following delivery by barge from locations outside the United States were interstate movements as "Wilmington was but an intermediate stopping place" and there was "an essential continuity of movement between the shipments to Wilmington and the subsequent movements from the port to points in North Carolina"); *see also Texaco*, 80 FERC at 61,806 ("storage by itself is not an indicia of purely intrastate movement").

[114] *See supra* P 50.

shipment, bills of lading, and the specific rate of turnover" in the storage or holding facility.[115] The Commission also may consider "the character of the billing, that is, whether it is local or through, change of ownership during the course of transportation, knowledge or lack of it on the part of the consignor or the ultimate destination or consignees, the character and length of the transaction taking place at the point of interruption, the intent on the part of the consignor with reference to the final destination, breaking of bulk and commingling of the commodity shipped with other shipments of the same commodity, power of the owner of the property to divert the shipment after the initial movement has begun, and the general practices and customs prevailing in a particular industry or trade."[116] These factors may be relevant to showing that the interstate journey does not cease at the point of interruption because there is a fixed and persisting intent to move product to the ultimate destinations as part of a larger interstate journey. However, as the Commission has explained, "[n]o single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the shipment."[117] Further, no factor can overcome the threshold requirement that product

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[115] *Northville*, 14 FERC at 61,207; *see also Dep't of Defense v. Interstate Storage*, 353 I.C.C. at 408-409 (evidence regarding whether title to the product was transferred, whether a single through rate was used, whether the oil was processed in storage, and the length of the storage, was relevant to find that the shipper had the intention to transport the petroleum through terminal storage to its final destination such that the intermediate storage point did not end the interstate character of the movement); *Amoco Pipeline Co.*, 62 FERC ¶ 61,119, at 61,803 (1993) (noting that factors such as "whether storage or processing interrupt the continuity of the transportation" are relevant to determining jurisdiction under the ICA); *Jet Fuel by Pipeline Within the State of Idaho*, 311 I.C.C. 439, at 442-443 (Div. 2, 1960) (relying on evidence that the jet fuel would be placed in storage for an indefinite time and filtered and processed before title would pass and before the oil would be reshipped to the final destination as evidence that "the continuity of the movement will have been interrupted to such an extent that the interstate movement is at an end").

[116] *Northville*, 14 FERC at 61,208 (quoting *Dep't of Defense v. Interstate Storage and Pipeline Co.*, 353 I.C.C. 397 at 407).

[117] *Northville*, 14 FERC at 61,208 (quoting *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397 at 407); *see also Baltimore v. Settle*, 260 U.S. at 171 (noting that when the shipper's intent is at issue, factors such as "through billing, uninterrupted movement, continuous possession" may be pertinent); *Atlantic Coast*, 275 U.S. at 268 (noting that "billing or forms of contract," though not determinative of the essential nature of the commerce, "may be one of a group of circumstances tending to show such character"); *Petroleum Products*, 71 M.C.C. 17 at 29 (noting that "many other subordinate factual circumstances . . . such as commingling in transit and in storage, processing before

moving in interstate transportation must come to rest before the intrastate portion of the journey can commence.[118] The additional factors are applied only after an initial finding that the interstate movement is interrupted to determine if there is nonetheless a fixed and persisting intent to transport product in interstate commerce.[119]

53. The Complainants incorrectly characterize the Commission's jurisdictional analysis of the fixed and persisting intent of the shipper as requiring that the initial shipper that originates the movement have actual knowledge of the specific ultimate destinations of the product at the time the shipment commences. The cases relied on by the Complainants do not support their position that PBF's asserted lack of actual knowledge of the ultimate destinations of the product requires the Commission to conclude that Guttman's shipments are intrastate.[120] The Complainants rely on the Commission's statement in the Hearing Order that "whether a shipment is interstate in nature depends on the intent of the shipper at the time the initial interstate transportation commences."[121] However, in the Hearing Order the Commission proceeded to analyze the facts and circumstances surrounding the movement, concluding that the shipments "are part of one continuous interstate movement" and "[t]here are no facts showing there is any break in the continuous nature of the interstate movement that would render Guttman's shipments intrastate in nature."[122] Thus, the Commission ascertains shipper intent based on "all the facts and circumstances surrounding the transportation,"[123] not

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reshipment, the form of the bill of lading, the specific rate of product turnover at the terminals, et cetera, are additional manifestations which may be important in certain types of cases, but which also may or may not be present or identical in others").

[118] *Texaco*, 80 FERC at 61,805 (the presumption that "all interstate movements are jurisdictional" can be overcome by "facts show[ing] a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate").

[119] *See, e.g.*, *Atlantic Coast*, 275 U.S. 257; *Northville*, 14 FERC ¶ 61,111; *Interstate Energy*, 32 FERC ¶ 61,294; *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397; *Baltimore v. Settle*, 260 U.S. 166; *Texaco*, 80 FERC ¶ 61,200.

[120] Complainants Brief on Exceptions at 37-43.

[121] *Id.* at 38 (quoting Hearing Order, 147 FERC ¶ 61,088 at P 25).

[122] Hearing Order, 147 FERC ¶ 61,088 at P 25.

[123] *Armstrong World Indus., Inc., Transp. Within Texas*, 2 I.C.C. 2d 63 at 69.

based solely on a shipper's subjective claim as to whether or not it had actual knowledge of the specific destinations of the product.

54. The Complainants also rely on the following statement of the Supreme Court in *Baltimore v. Settle*:

> The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began.[124]

55. It is true that an in-state movement following a cross-border shipment is not necessarily interstate, and may be found to be intrastate if it is determined that the shipper lacked a fixed and persisting intent to move product in interstate commerce, "even though some further movement was contemplated when the original movement began."[125] As noted above, the subsequent movement may be found to be intrastate where there is evidence of a sufficient break in transportation such that the shippers lack a fixed intent to move product interstate.[126] It does not follow that any in-state movement following a

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[124] *Baltimore v. Settle*, 260 U.S. at 173; Complainants Brief on Exceptions at 38. In *Baltimore v. Settle*, the Supreme Court held that where intent was not in issue because the shippers admitted that they had the original and persisting intention to ship the goods to the ultimate interstate destination and did so, the interstate journey did not end at an intermediate stopping place where the goods were temporarily delivered and then reshipped. The Supreme Court stated that under these circumstances, "where it is admitted that the shipment made to the ultimate destination had at all times been intended," the subsequent in-state movement was part of a larger, interstate journey as a matter of law, and other factors such as "through billing, uninterrupted movement, [and] continuous possession by the carrier" need not be considered. 260 U.S. at 171. The Supreme Court went on, in the above excerpt relied on by Complainants, to distinguish the case before it "where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out" from other cases where goods are delivered and reshipped to another point, which may or may not be found to give rise to a separate intrastate movement. *Id.* at 173-174.

[125] *Baltimore v. Settle*, 260 U.S. at 173.

[126] *Texaco*, 80 FERC at 61,805. The Supreme Court noted in *Baltimore v. Settle*

cross-border shipment is intrastate, including continuous movements with no evidence of interruption, so long as the shipper originating the movement claims to lack knowledge or intent with respect to final destinations.

56. The three other cases relied on by the Complainants to support their characterization of the shipper intent test, *Atlantic Coast Line*, *Petroleum Products*, and *Northville*,[127] all involved a determination that interstate transportation ended at storage facilities such that there was no fixed and persisting intent to move product in interstate commerce regarding the subsequent movement to the ultimate destinations.[128] These cases are consistent with the basic proposition that interstate transportation must end before a subsequent, separate intrastate movement can begin. These cases do not support the Complainants' position that a shipper's claimed lack of knowledge of specific ultimate destinations is determinative of the jurisdictional analysis. The Presiding Judge correctly concluded that "while the intent, or lack thereof, of a shipper on an initial cross-border segment can be a factor; it is not by itself determinative."[129]

57. In conclusion, the Complainants' position that the original shipper on a cross-border movement followed by an in-state movement must have actual knowledge of the specific ultimate destinations or the asserted intention that the goods be delivered to those particular destinations for the subsequent movement to be found to be interstate[130] lacks

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that a subsequent intrastate movement may occur in situations involving "[s]hipments to and from distributing points" where "the applicable tariffs do not confer reconsignment or transit privileges." 260 U.S. at 173.

[127] *See* Complainants Brief on Exceptions at 38-40 (discussing *Atlantic Coast*, 275 U.S. 257; *Petroleum Products*, 71 M.C.C. 17; and *Northville*, 14 FERC ¶ 61,111).

[128] *Atlantic Coast*, 275 U.S. at 269 (the interstate and foreign transportation ended at seaboard storage stations); *Petroleum Products*, 71 M.C.C. 17 at 31-32 (truck distribution within a state subsequent to terminal storage were intrastate movements); *Northville*, 14 FERC at 61,208 (local distribution following storage facilities used to maintain inventory was intrastate commerce); *see also Iron and Steel Articles from Wilmington*, 323 I.C.C. 740 at 743 (noting that in *Atlantic Coast* "[t]he storage stations were natural places for a change from interstate and foreign transportation to intrastate commerce").

[129] Initial Decision, 155 FERC ¶ 63,008 at P 79.

[130] *See* Complainants Brief on Exceptions at 27-28, 37-40.

foundation, as the Presiding Judge correctly concluded.[131] The Commission ascertains the fixed and persisting intent of the shippers based on the facts and circumstances surrounding the transportation.

b. The Presiding Judge Correctly Found the Movements are Interstate

58. The Commission affirms the Presiding Judge's holding that Guttman's shipments are interstate. The record supports the Presiding Judge's findings that the shipments are part of a continuous interstate journey from Delaware to ultimate destinations in Pennsylvania. The record shows that in carrying out its obligations under a supply contract, PBF transports product from Delaware City on the Delaware Pipeline and Sunoco Logistics system onto the Laurel/Buckeye system at Chelsea Junction for delivery by Guttman to downstream locations in Pennsylvania.[132] There is no evidence in the record indicating that the continuity of transportation is broken at Chelsea Junction or at any downstream point on the Laurel/Buckeye system such that the interstate journey ceases prior to the product arriving at its ultimate Pennsylvania destinations.

59. As the Commission stated in *Texaco*, "all interstate movements are jurisdictional unless the facts show a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate."[133] There are no facts in the record indicating a sufficient break in the continuity of this interstate transportation such that a portion of the movement on the Laurel/Buckeye system may be considered intrastate. There are no tankage facilities at the connection between Sunoco Logistics and the Laurel/Buckeye system at Chelsea Junction.[134] The product moves from PBF's Delaware City Refinery to the Laurel/Buckeye system, where Guttman takes title at Chelsea Junction, but such product never enters merchant or leased storage and there is no indication that the product is marketed from Chelsea Junction.[135] The Presiding Judge appropriately concluded, based on these facts, that the essential character of the movements is that they are part of a

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[131] Initial Decision, 155 FERC ¶ 63,008 at P 79.

[132] *Id.* PP 100, 109; Complainants Brief on Exceptions at 8-13; Ex. GP-70 at 3-4; Ex. BPL-43 at 28; Ex. S-1 at 11; Tr. 527-528 (Gerbman).

[133] 80 FERC at 61,805.

[134] Initial Decision, 155 FERC ¶ 63,008 at P 110; Ex. S-1 at 11-13; Ex. BPL-52 at 21-22.

[135] Initial Decision, 155 FERC ¶ 63,008 at PP 88, 110; Complainants Brief on Exceptions at 8-13, 35-36, 49; Ex. BPL-43 at 15-16; Tr. 332-338, 343 (Gerbman).

larger interstate journey. The Complainants, in fulfilling their contractual obligations, ship product from Delaware City to destinations on the Laurel/Buckeye system in Pennsylvania on a continuous interstate journey. The product does not come to rest at Chelsea Junction, Booth, or any other point in Pennsylvania such that the shippers may be found to lack a fixed and persisting intent to move the product to the ultimate destinations.

60. The Complainants' argument that the Presiding Judge gave no weight to criteria and factors that have been identified by the Commission as evidence that within-state transportation is intrastate overlooks the threshold requirement discussed above that interstate transportation must cease before a subsequent, separate intrastate movement can commence. Where, as here, a shipment of oil by pipeline crosses state lines, there must be some evidence of a break in the continuity of transportation to delineate a separate intrastate movement. The *Northville* criteria relied on by the Complainants are applicable where a break in the interstate transportation has been identified, such as at a terminal, storage facility, or distribution point. In determining whether a portion of the movement should be considered a separate, intrastate movement or simply part of a larger, interstate movement, the Commission may consider whether –

> (1) [a]t the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of

> this distribution within the single state is specifically arranged only after sale or allocation from storage.[136]

61. The criteria refer to a "terminal storage" point. Here, the absence of any non-operational storage at Chelsea Junction and Booth, or any other evidence that the movements come to rest at those points, is critical. The Presiding Judge correctly concluded that there is no evidence in the record that the continuity of the transportation has been broken in this case.[137] There is no point of interruption from which the *Northville* criteria can be applied.

62. Accordingly, the Commission rejects the Complainants' claims that the Presiding Judge did not give appropriate weight to the three *Northville* criteria. The Presiding Judge was not required to give any weight to the fact that PBF does not ship product from Delaware City to fill any specific order for a specific quantity of a given product to be moved through to a specific destination beyond Chelsea Junction,[138] because Chelsea Junction is not a terminal, storage, or distribution point where the movement of the product could be interrupted. The Complainants' argument that the Presiding Judge erred by not giving any weight to the fact that Chelsea Junction is a distribution point is rejected because no evidence in the record indicates that Chelsea Junction is a distribution point.[139] There are no tankage facilities at the connection between Sunoco Logistics and the Laurel/Buckeye system at Chelsea Junction, and there is no evidence that product enters merchant storage or that product is marketed or sold off-system at Chelsea Junction.[140] Similarly, the Presiding Judge did not err in deciding not to give any weight to the fact that Guttman is able to, and sometimes does, rearrange destinations after shipments have left Chelsea Junction.[141] This fact does not satisfy the third *Northville* criterion because the product does not come to rest at Chelsea Junction.

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[136] *Northville*, 14 FERC at 61,207 (quoting *Petroleum Products*, 71 M.C.C. 17 at 29).

[137] Initial Decision, 155 FERC ¶ 63,008 at P 128.

[138] Complainants Brief on Exceptions at 36-37.

[139] *Id.* at 35-36.

[140] Initial Decision, 155 FERC ¶ 63,008 at PP 88, 95, 110; Complainants Brief on Exceptions at 8-13, 35-36, 49; Ex. S-1 at 11-13; Ex. BPL-43 at 34; Tr. 332-338, 343 (Gerbman).

[141] Complainants Brief on Exceptions at 36-37.

63. The Complainants' argument against the Presiding Judge's reliance on the absence of merchant storage or leased storage is rejected for the same reasons.[142] The absence of merchant or leased storage is relevant evidence that supports the Presiding Judge's finding that the interstate journey is not broken in this case. The Complainants argue that the commercial function of product handling at Chelsea Junction and Booth is similar to the commercial function of merchant storage because PBF products received at Chelsea Junction are placed into tankage at Booth from which smaller shipments are subsequently drawn down for delivery to multiple final destinations determined by Guttman.[143] The breakout tankage at Booth is not equivalent to merchant storage as it is used only for operational purposes.[144] There is no evidence to support a finding that the storage is offered for the convenience of shippers or allows shippers to meet their inventory needs.[145] As the Presiding Judge correctly found, the use of breakout storage tanks at Booth is an integral part of the transportation service and does not interrupt the interstate transportation of the product.[146]

64. Even if a certain *Northville* factor identified by the Complainants was relevant to the jurisdictional analysis of Guttman's shipments, no single factor is essential or

[142] *Id.* at 49.

[143] *Id*.

[144] Initial Decision, 155 FERC ¶ 63,008 at P 110; Ex. BPL-43 at 12-16; S-1 at 11-13; Tr. 336.

[145] *See, e.g.*, *Interstate Energy*, 32 FERC at 61,691 (terminal storage was "not used to meet daily requirements but rather to meet the inventory needs of the individual shippers"); *Northville*, 14 FERC at 61,208 (storage facilities were "used to maintain inventory, and oil in storage at these points is drawn upon as customer demand dictates"); *U.S. Finishing Co. v. N.Y., New Haven & Hartford Railroad Co.*, 142 I.C.C. 331 at 331-333 (1928) (oil was unloaded into storage and remained "to be subsequently distributed to complainant and others according to commercial needs").

[146] Initial Decision, 155 FERC ¶ 63,008 at P 132.

determinative.[147] Thus, the Presiding Judge was not required to address and give weight to each criterion and factor individually to conduct a proper jurisdictional analysis. The Commission finds that the Presiding Judge properly analyzed all the pertinent facts and circumstances surrounding the transportation to reasonably determine that the essential character of the movement is interstate.

65. The Commission finds that the Presiding Judge appropriately did not give controlling weight to PBF's claimed lack of knowledge or intent with respect to the precise final destinations of Guttman's shipments. The Presiding Judge correctly noted that "even if PBF does in fact lack this specific knowledge, this would not be determinative that the transportation is intrastate in nature."[148] To hold otherwise would be contrary to the long-standing principle that jurisdiction is determined based on the essential character of the commerce, not the form by which the entities involved may choose to structure the transaction or other artifice.[149] For example, in *Texas & New*

[147] *Northville*, 14 FERC at 61,208 ("No single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the shipment.") (quoting *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397 at 407); *Texaco*, 80 FERC at 61,804 ("The determination of jurisdiction under the ICA depends on the specific facts of the individual case."); *see also Atlantic Coast*, 275 U.S. at 268-269 ("the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it"); *Petroleum Products*, 71 M.C.C. 17 at 29 ("Obviously . . . it is not necessary that the entire 'bundle [of circumstances]' be present in a given case before a proper determination can be made.").

[148] Initial Decision, 155 FERC ¶ 63,008 at P 130.

[149] *Atlantic Coast*, 275 U.S. at 268 ("The question of whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."); *U.S. v. Erie R. Co.*, 280 U.S. at 101-102 ("[T]he nature of the shipment is not dependent upon the question when or to whom the title passes. It is determined by the essential character of the commerce.") (internal citations omitted); *Baltimore v. Settle*, 260 U.S. at 170 ("whether the interstate or intrastate tariff is applicable depends upon the essential character of the movement" and "the contract between shipper and carrier does not necessarily determine the character"); *Pipe Line Cases*, 234 U.S. 548 at 560 (1914) (interstate transportation "cannot be made wholly dependent upon technical questions of title"); *Texaco*, 80 FERC at 61,807 (noting that the Commission should "beware of allowing form to supplant substance").

Orleans Railroad Company v. Sabine Tram Company,[150] the Supreme Court rejected as controlling the argument that a manufacturer did not have precise knowledge of the ultimate destination that lumber shipments were transported to by a subsequent shipper after the manufacturer completed its contractual obligation to deliver the lumber by rail between points within the state of Texas (Ruliff, Texas to Sabine, Texas), following which the lumber was transported by ship to Europe.[151] The Court found that the argument that the manufacturer lacked "particular knowledge" of the final destination of the lumber after it was delivered to the export shipper "cannot prevail" because "[t]he determining circumstance is that the shipment of lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries" and "the essential character of the commerce, not its mere accidents, should determine."[152] The Court concluded that the fact that the manufacturer had no concern or connection regarding the precise final destination of the lumber was of "no consequence."[153] The Commission agrees with the Presiding Judge that the movements at issue are interstate, even if as PBF alleges, it may not know the precise actual Pennsylvania destinations to which Guttman will ultimately ship product at the time PBF originates the initial transportation because Guttman may change the destinations of the shipments.

66. Nor is PBF's assertion that it lacks intent with regard to the specific final destinations of the shipments able to change the objective reality of the interstate nature of the movements. While one of the primary factors relied on to determine the essential character of the movement is "the fixed and persisting intent of the shipper, or the one for whose benefit the shipment is made,"[154] the fixed and persisting intent is not a subjective analysis, but instead "must be drawn 'from all the facts and circumstances surrounding the transportation."[155] Further, in conducting the jurisdictional analysis, the Commission

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[150] 227 U.S. 111 (1913).

[151] *Id.* at 118, 126, 130.

[152] *Id.* at 126.

[153] *Id.* at 130.

[154] *Northville*, 14 FERC at 61,208 (quoting *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397 at 407); *see also Interstate Energy*, 32 FERC at 61,690 ("In determining whether a transaction is interstate in character, the courts have held that one of the most important factors is the transportation intent of the shipper at the time the shipment commences its journey.") (citing *Atlantic Coast*, 275 U.S. 257 and *Baltimore v. Settle*, 260 U.S. 166).

[155] *Armstrong World Indus., Inc.*, 2 I.C.C. 2d 63 at 69.

presumes that "all interstate movements are jurisdictional unless the facts show a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate."[156] The Presiding Judge appropriately gave controlling weight to the fact that there is no evidence that the transportation is interrupted at a terminal, storage, or distribution point, or comes to rest in any manner that would indicate that the interstate journey was broken when the product is delivered at Chelsea Junction, Booth, or subsequent downstream locations such that the Complainants could be found to lack a fixed and persisting intent to ship product in interstate commerce. Thus, the facts in the record support a determination that the Complainants at the time the transportation commences and at all times thereafter have the fixed and persisting intent to, and do move product in interstate commerce, notwithstanding their assertions to the contrary.

67. Simply put, the evidence shows that the Complainants have knowledge of the ultimate destinations of the product. The Presiding Judge appropriately analyzed the facts and circumstances surrounding the transportation in the record to conclude that before transportation commences, the Complainants are aware that the product originates from Delaware City and that all volumes will be delivered to Pennsylvania.[157] In fulfilling its contractual obligation, PBF moves product from its Delaware City Refinery to Chelsea Junction,[158] and there is no evidence in the record indicating that PBF ever sourced product from an alternative location in Pennsylvania in carrying out its contract with Guttman. Guttman enters "SPL" into Laurel/Buckeye's T-4 portal as the origin tanker for its shipments of PBF product, thereby indicating that the product originates at Delaware City before the shipment is scheduled.[159] Guttman obtains the origin location information from PBF prior to shipment.[160] The recurring nature of the shipments made pursuant to the contract and facts regarding the Buckeye/Laurel system indicate that PBF knows that the product will be delivered to destinations in Pennsylvania.[161] Although the

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[156] *Texaco*, 80 FERC at 61,805.

[157] Initial Decision, 155 FERC ¶ 63,008 at P 129 (citing Tr. 229-232, 269-270 (Quarto)).

[158] Ex. GP-43 at 7, 10.

[159] Initial Decision, 155 FERC ¶ 63,008 at PP 92, 99, 112; Ex. BPL-43 at 18-22, 28; Ex. GP-70 at 3; Tr. 270 (Quarto).

[160] Tr. 226 (Quarto); Tr. 326 (Gerbman).

[161] *See Texas & New Orleans Railroad v. Sabine*, 227 U.S. at 119, 130 (relying on the fact that shipments followed a recurring pattern to find that the transportation was

supply contract does not require PBF to source product from Delaware City or require Guttman to inform PBF of the ultimate destination of the product,[162] all evidence in the record indicates that in carrying out the supply contract the Complainants intend to and do move product from Delaware to Chelsea Junction and, without interruption, on to ultimate destinations on the Laurel/Buckeye system in Pennsylvania. The Commission affirms the Presiding Judge's finding based on these facts which show the Complainants have knowledge at the time the transportation commences that the product originates in Delaware and that all volumes will be delivered to Pennsylvania.[163]

68. The Complainants' exceptions regarding the *Northville* factors also fail. At the outset, one of the listed factors is "the character and length of the transaction taking place *at the point of interruption*,"[164] but here there is no point of interruption to consider. Excluding this factor, the Complainants argue that the Presiding Judge erred in not giving weight to each of the remaining listed factors. As stated above, the Presiding Judge was not required to give weight to each of the individual factors listed in *Northville* in order to determine the essential character of the movement. The *Northville* decision quotes portions of *Petroleum Products*[165] and *Department of Defense v. Intestate Storage*,[166] which include the criteria and factors as part of a general discussion of the legal precedents on determining whether a movement is interstate commerce. *Northville* and *Department of Defense v. Interstate Storage* explain that "[n]o single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character" of the movement.[167] *Petroleum Products* states that in addition to the three primary criteria, "many other subordinate factual circumstances . . . such as commingling in transit and in storage, processing before reshipment, the form of the bill of lading, the specific rate of

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foreign commerce); Initial Decision at P 130; Tr. 208-209, 232-233, 308-309.

[162] Complainants Brief on Exceptions at 8-9.

[163] Initial Decision, 155 FERC ¶ 63,008 at PP 129-130; Ex. BPL-43 at 17-22; Ex. GP-43 at 10; Ex. GP-70 at 3; Tr. 208-209, 226, 232-233, 270 (Quarto); Tr. 308-310, 326 (Gerbman).

[164] *Northville*, 14 FERC at 61,208 (emphasis added).

[165] 71 M.C.C. 17 (1957).

[166] 353 I.C.C. 397 (1977).

[167] *Northville*, 14 FERC at 61,208; *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397 at 407.

product turnover at the terminals, et cetera, are additional manifestations which may be important in certain types of cases, but which also may or may not be present or identical in others."[168] In addition, each of the precedents discussed in *Northville* involved a point of interruption where the product was held in storage facilities, as did the facts of the *Northville* case.[169] Without addressing every single criterion and factor, the Commission in *Northville* proceeded to analyze the facts surrounding the movements to find a storage point that was used by the shippers for inventory "determinative of the essential character of the commerce."[170] There, as here, the essential character of the commerce may be ascertained on balance without a rigid analysis of each criterion and factor.

69. The Commission finds that the Presiding Judge correctly concluded that the presence of separate bills does not factor significantly into determining the nature of the transportation in this proceeding. The use of through billing is not necessarily determinative.[171] The Presiding Judge correctly observed that "[i]n this instance, the separate bills are simply a product of the parties' contractual determination to transfer title at the same point where the shipment went from one interstate carrier (Sunoco Logistics) to the Laurel/Buckeye system while the product continued moving in an unbroken chain of transportation that started in Delaware."[172] The Commission has considered the use of a through rate or joint rate as opposed to local or separate rates as one factor in determining whether a break in the transportation was sufficient to end the interstate journey,[173] but here, as discussed above, there is no evidence that the product comes to rest at Chelsea Junction, so the absence of a joint or through tariff is of little significance.

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[168] *Petroleum Products*, 71 M.C.C. 17 at 29.

[169] *See Northville*, 14 FERC at 61,206-61,208 (discussing *Atlantic Coast*, 275 U.S. 257, *Petroleum Products*, 71 M.C.C. 17, *Jet Fuel by Pipeline Within the State of Idaho*, 311 I.C.C. 439, and *Dep't of Defense v. Interstate Storage*, 353 I.C.C. 397).

[170] *Id.* at 61,209.

[171] *R.R. Comm'n of Ohio v. Worthington*, 225 U.S. 101, 110 (1912) ("the test of through billing is not necessarily determinative").

[172] Initial Decision, 155 FERC ¶ 63,008 at P 131.

[173] *See, e.g.*, *Interstate Energy*, 32 FERC at 61,691; *Northville*, 14 FERC at 61,206, 61,209.

70. For the same reason, the Commission finds that the Presiding Judge properly found that the fact that the title and risk of loss pass from PBF to Guttman at Chelsea Junction is not a determining factor because the transfer of title occurs while the product remains in transportation. As an initial matter, it is well established that "the nature of the shipment is not dependent upon the question of when or to whom the title passes."[174] The Complainants assert that "a change of ownership while product remains in transportation is precisely what is contemplated by the second factor in *Northville*, which is described as a 'change of ownership during the course of transportation.'"[175] There is nothing in *Northville* to suggest that transfer of title must factor significantly into determining the nature of the transportation in the case of a continuous movement that does not come to rest.[176] The Complainants also claim that the Presiding Judge's denial of weight to the change in ownership is contrary to *Atlantic Coast*,[177] where the Supreme Court stated "[t]he question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."[178] This statement does not support a finding that the transfer of title from PBF to Guttman must be given weight in the jurisdictional analysis in this proceeding, nor does the Supreme Court's analysis in *Atlantic Coast.* In *Atlantic Coast*, oil was transported from out-of-state origins by tank steamers to storage facilities at Port Tampa and Jacksonville, Florida and from there to ultimate destinations in Florida. The Court concluded that the movements from the Port Tampa and Jacksonville storage facilities to the ultimate destinations were intrastate transportation. The Court considered the fact

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[174] *U.S. v. Erie R. Co.*, 280 U.S. at 101; *see also Iron and Steel Articles from Wilmington*, 323 I.C.C. 740 at 742 ("The question of when or to whom title passes is not controlling"); *Pipe Line Cases*, 234 U.S. at 560 (interstate transportation "cannot be made wholly dependent upon technical questions of title"); *Pa. R. Co. v. Clark Bros Coal Mine Co.*, 238 U.S. 456, 466 (1915) ("In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative.").

[175] Complainants Brief on Exceptions at 45-46 (quoting *Northville*, 14 FERC at 61,208).

[176] Transfer of title appears not to have occurred with respect to the movements considered in the *Northville* case.

[177] Complainants Brief on Exceptions at 46 (citing *Atlantic Coast*, 275 U.S. at 268).

[178] *Atlantic Coast*, 275 U.S. at 268.

that title was transferred when the oil was delivered at the storage facilities,[179] along with other factors such as the fact that the oil was held in storage for various periods for convenient distribution to the shipper's customers in Florida and final destinations were not arranged until after the oil was deposited in the storage facilities.[180] These factors were relevant to the Court's determination that "[t]he seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate . . . ."[181] The Court's focus on the facts surrounding the use of the storage facilities in *Atlantic Coast* undermines rather than supports the Complainants' assertion that the Presiding Judge was required to give weight to the transfer of title from PBF to Guttman while the product remains in transportation. The Complainants do not provide a single case that supports the proposition that transfer of title must be afforded weight where the product remains in continuous movement and does not come to rest.

71. The Commission rejects the Complainants' argument that the Presiding Judge erred in not giving any weight to the fact that PBF lacks knowledge of the final destination or consignees to which Guttman will deliver products, and to the fact that PBF as the consignor lacks intent to ship products to any specific destination.[182] As discussed above, the record supports the Presiding Judge's finding that PBF has knowledge of the final destinations of the shipments on the Laurel/Buckeye system. The record also does not support PBF's assertion that it lacks knowledge of the consignee. In this case, the movements involve shipments and a transfer of title from PBF to Guttman. PBF is the consignor, as it acknowledges,[183] and Guttman is the consignee. In any event, this factor is not sufficient to outweigh the other facts in this case that indicate the essential character of the movement is interstate.

72. The Commission also finds that the Presiding Judge did not err by not giving any weight to Guttman's ability to divert shipments after the initial movement has commenced.[184] The facts discussed above demonstrate that there is a continuous, unbroken interstate movement from Delaware to Pennsylvania and both PBF and Guttman have the intention that the product move to the final Pennsylvania

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[179] *Id.* at 263, 267.

[180] *Id.* at 267-269.

[181] *Id.* at 269.

[182] Complainants Brief on Exceptions at 46-47.

[183] *Id*.

[184] *Id.* at 50.

destinations.[185] The fact that Guttman has the ability to and on occasion does change delivery points and destinations for individual batches does not alter the essential character of the commerce.[186] For the same reasons, the Presiding Judge did not err in deciding not to give weight to the Complainants' allegations regarding breaking of bulk and commingling, Guttman's ability to change the destinations of shipments, and industry practices. These facts do not bear significantly on the jurisdictional determination in this case where there is no break in the continuity of the transportation. There are no facts in the record to suggest that the Complainants contemplate a different result other than that the product be transported from Delaware to Buckeye/Laurel's Pennsylvania destinations and there is no evidence that the product is ever transported elsewhere, or even a likelihood that shipments may be delivered elsewhere.

73. Finally, the Presiding Judge did not err by not giving any weight to the fact that Buckeye's test for classifying shipments does not apply the *Northville* criteria and factors. In finding that a hearing regarding the jurisdictional issue was appropriate, the Commission noted that certain factual disputes could not be resolved based on the pleadings alone, including "how Buckeye fulfills its obligation under the ICA to properly classify shipments," among others.[187] While Buckeye's method for classifying shipments may be relevant to understanding the context of the proceeding, the fact that Buckeye's test for classifying shipments does not specifically consider each of the *Northville* criteria and factors has no bearing on this proceeding. As the Rehearing Order states, "[t]he only issue to be addressed at hearing is whether the Complainants' shipment should be considered interstate or intrastate transportation."[188] As a practical matter, a pipeline may fulfill its obligation under the ICA to properly classify shipments without using a method that applies the specific *Northville* criteria and factors to each shipment.

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[185] Initial Decision, 155 FERC ¶ 63,008 at PP 129-130; Ex. BPL-43 at 17-22; Ex. GP-43 at 10; Ex. GP-70 at 3; Tr. 208-209, 226, 232-233, 270 (Quarto); Tr. 308-310, 326 (Gerbman).

[186] *See Iron and Steel Articles from Wilmington*, 323 I.C.C. 740, at 742-744 (finding that the fact "[t]hat a particular article ordered for one store may or may not be diverted to another does not affect the character of the commerce" in a case where "[n]o single step described in the record constitutes an end in itself" and there was "an essential continuity of movement"), *aff'd*, *N.C. Utilities Comm'n v. U.S.*, 253 F. Supp. 930 (E.D. N.C. 1966).

[187] Rehearing Order, 149 FERC ¶ 61,103 at P 8.

[188] *Id.* P 9.

74. Because the Commission affirms the Presiding Judge's finding that the movements are interstate, the Commission also affirms the Presiding Judge's finding that the issue of reparations is moot, and rejects the Complainants' argument on exceptions with respect to reparations based on the difference between the interstate and intrastate rate.

B. Market Power Issues

1. Background on Buckeye's Rates

75. In 1990, the Commission approved an experimental program for Buckeye's rates, including both competitive and non-competitive markets.[189] The experimental program represented an early effort to determine if an alternative to the traditional cost-of-service ratemaking methodology could be used and involved a hybrid of market-based rate authority, rate ceilings, and other constraints. The Commission determined that Buckeye lacked significant market power in fifteen destination markets,[190] including Pittsburgh and Harrisburg. The Commission allowed Buckeye to charge market-based rates for those markets subject to certain limits. In particular, those rates were capped at a real increase of no more than fifteen percent over a two-year period, and individual rate increases not exceeding the change in the Gross National Product (GNP) deflator plus 2 percent would take effect without suspension or investigation. The experimental program used price changes in the markets where Buckeye was found to lack significant market power to set certain limits and parameters for rate changes in non-competitive markets. The experimental program was initially accepted for a three-year period.[191]

76. In 1993, the Commission issued regulations to comply with the Energy Policy Act of 1992[192] establishing new methodologies for oil pipelines to change their rates,

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[189] *Buckeye Pipe Line Co.*, Opinion No. 360, 53 FERC ¶ 61,473 (1990), *order on reh'g*, Opinion No. 360-A, 55 FERC ¶ 61,084 (1991).

[190] The fifteen markets for which the Commission concluded Buckeye lacked significant market power were Scranton-Wilkes Barre; Pittsburgh; Harrisburg-York-Lancaster; Philadelphia; Columbus; Lima; Toledo; Detroit; Saginaw-Bay City; Fort Wayne; Kokomo-Marion; Indianapolis; Hartford-New Haven-Springfield; Seattle; and Terre Haute. Opinion No. 360-A, 55 FERC at 61,254.

[191] Opinion No. 360, 53 FERC at 62,675-62,676, 62,680; Opinion No. 360-A, 55 FERC at 61,262.

[192] Energy Policy Act of 1992, Pub. L. No. 102-486 Sec. 1803(b), 106 Stat. 3010 (Oct. 24, 1992) (directing the Commission to provide a simplified and generally

including indexing, settlement rates, and market-based rates.[193] Regarding market-based rates, the Commission found that pipelines would be allowed "to make a *Buckeye*-type showing and justify charging market-based rates."[194] In 1994, the Commission issued regulations that implemented market-based rate procedures for an oil pipeline to make a showing that it does not possess significant market power in the relevant markets.[195] The Commission also re-evaluated Buckeye's experimental rate program.[196] The Commission found that Buckeye would not need to requalify for market-based rates pursuant to the new regulations for those markets where the Commission had already determined Buckeye lacked significant market power. The Commission allowed the program to continue effective January 1, 1995 subject to review every five years.[197]

77. The Commission did not re-evaluate Buckeye's experimental rate program until 2012, when Buckeye filed to increase its rates.[198] Although the proposed rate increases were within the limits of the experimental rate program, the Commission questioned whether the experimental program should be allowed to continue. The Commission observed that when Buckeye's experimental program was approved it was novel and not applicable to other oil pipelines, and that since that time the Commission had developed alternative ratemaking methodologies that were applicable to all oil pipelines and widely used. Therefore, the Commission rejected Buckeye's tariff filings and directed Buckeye to show cause why it should not be required to file its rates pursuant to the ratemaking

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applicable ratemaking methodology for oil pipelines, and to streamline procedures in oil pipeline proceedings).

[193] *Revisions to Oil Pipelines Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993), *order on reh'g and clarification*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (1994).

[194] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,957.

[195] *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007, *order on reh'g*, Order No. 572-A, 69 FERC ¶ 61,412 (1994), *aff'd sub nom. Assoc. of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[196] *See Buckeye Pipe Line Co., LP*, 66 FERC ¶ 61,348 (1994); *Buckeye Pipe Line Co., LP*, 69 FERC ¶ 61,302 (1994).

[197] The review was intended to take place concurrent with the Commission's review of the oil pipeline index. Order No. 572-A, 69 FERC at 62,163.

[198] *Buckeye Pipe Line Co., L.P.*, 138 FERC ¶ 61,239 (2012).

methodologies contained in Part 342 of the Commission's regulations.[199] In 2013, the Commission determined that Buckeye's experimental rate program should be discontinued.[200] Nonetheless, the Commission determined that Buckeye would not have to requalify for market-based rates in the markets where Buckeye was found by the Commission to lack market power, and could continue charging market-based rates in those markets. The Commission noted that shippers were not precluded from "filing a complaint (with its attendant burden of proof) asserting that a market is no longer competitive because of changed circumstances and that Buckeye, in fact, does not lack significant market power."[201] The Complaint in this proceeding was filed later that year.

78. In addition to the jurisdictional claim discussed above, the Complainants alleged that Buckeye has significant market power in the Pittsburgh and Harrisburg destination markets and the origin market including Buckeye's Chelsea Junction receipt point (Chelsea Junction origin market). The Complainants included the affidavit of Daniel S. Arthur, which the Complainants assert provided evidence of changed circumstances in the relevant destination markets since 1990 and updated market concentration calculations for both the destination and origin markets. The Complainants also represented that there was no examination of whether Buckeye possessed market power in any origin market in the 1990 proceeding because the Commission did not implement

[199] *Id.* PP 14-15.

[200] *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140 (2013).

[201] *Id.* P 14.

the requirement to examine competitive alternatives in origin markets until the 1994 regulations.[202]

79. The Commission's order setting the market-based rate issues for hearing discussed the issue of "what threshold evidence is necessary for a Complainant to demonstrate changed circumstances in a given market that may warrant a hearing to consider revocation of an oil pipeline's previously approved market-based rate authority."[203] Specifically, "[w]hile the Commission does not expect that a complainant will complete an entire market analysis similar to what is necessary in an application for market-based rates, the Commission does expect some analysis showing why some or all of the factors that led to a conclusion of a lack of market power are no longer present or relevant."[204] The Commission found that the "Complainants provided sufficient evidence of substantial changes in competitive circumstances" to warrant a hearing regarding Buckeye's market power in Harrisburg, Pittsburgh, and Chelsea Junction.[205] The Commission took into account the time that had elapsed since Buckeye's market-based rate authority was originally approved in 1990 and changes that had occurred in the relevant markets as well as the Commission's market-based rate methodology in concluding that the Complainants had made an adequate threshold showing.[206]

80. The Hearing Order also provided guidance regarding the market-based rate standards applicable to oil pipelines, including Order No. 572 implementing the Commission's market-based rate regulations in 1994,[207] and the Commission's more

[202] Complaint at 14-15. With respect to the markets where Buckeye was found to have significant market power, the Commission stated that Buckeye may file future rates pursuant to Part 342 of the Commission's regulations.

[203] Hearing Order, 147 FERC ¶ 61,088 at P 40.

[204] *Id.*

[205] *Id.* P 44.

[206] *Id.* PP 41-44.

[207] Order No. 572, FERC Stats. & Regs. ¶ 31,007.

recent order in *Seaway*,[208] which discussed the framework for examining market alternatives and assessing market concentration.

81. The Presiding Judge concluded that the Complainants had not met their burden of proof to show that Buckeye can exercise market power in the origin market and Pittsburgh destination market, but that the Complainants and Trial Staff met their burden of proof to demonstrate that Buckeye can exercise market power in the Harrisburg destination market.[209] The Complainants and Buckeye raise numerous exceptions as discussed below.

2. Burden of proof for challenges to an oil pipeline's existing market-based rate authority

a. Initial Decision

82. The Presiding Judge agreed with all parties that the Complainants bore the burden of proof to demonstrate that Buckeye's market-based rate authority should be revoked in the origin market and Harrisburg and Pittsburgh destination markets, and that Trial Staff shared the Complainants' burden with respect to its claim that Buckeye's market-based rate authority should be revoked in the Harrisburg destination market.[210]

83. The Presiding Judge rejected Buckeye's assertion that, in addition to showing that Buckeye possesses market power, the Complainants must also show that competitive circumstances have changed materially from the time the Commission approved Buckeye's market-based rate authority in the early 1990s.[211] The Presiding Judge reasoned that if she were to find that the Complainants and Trial Staff met their burden to show that Buckeye can exercise market power in the relevant markets, it could be assumed that the market structure and competitive circumstances had changed.[212] The Presiding Judge also noted that the Commission's order setting the market-based rate issues for hearing already found that the Complainants provided sufficient evidence of substantial changes in competitive circumstances to warrant a hearing, and to add an

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[208] *Enterprise Products Partners L.P. and Enbridge Inc.*, 146 FERC ¶ 61,115 (2014) (*Seaway I*), *order on reh'g*, 152 FERC ¶ 61,203 (2015) (*Seaway II*).

[209] Initial Decision, 155 FERC ¶ 63,008 at P 494.

[210] *Id.* P 136.

[211] *Id.* PP 141, 143.

[212] *Id.* P 141.

additional evidentiary burden that the Commission had not mandated would be improper.[213] The Presiding Judge further found that because there was no examination relating to any origin market in the original proceeding approving Buckeye's market-based rate authority, there would be no basis for comparison even if she were to adopt a heightened evidentiary standard.[214]

b. Briefs on Exceptions

84. Buckeye argues on exceptions that the Presiding Judge erred in finding that a party challenging market-based rates does not have the burden to show a material change in circumstances relative to the time the market-based rate authority was issued.[215] Buckeye argues that Opinion No. 360 held that Buckeye had the burden of proof to demonstrate "that it lacks significant market power in each market in which it seeks light-handed regulation."[216] Buckeye argues that equity dictates that the Complainants have the burden to demonstrate that market circumstances have materially changed relative to the circumstances identified by the Commission in its prior determination that Buckeye lacked market power, in addition to showing that Buckeye now has significant market power.

85. Buckeye argues that the Presiding Judge wrongly concluded that the Commission found sufficient evidence of changed circumstances in the Hearing Order. Buckeye further argues that the Presiding Judge erred in dismissing the statement in Opinion No. 360 that "the Commission's finding that Buckeye lacks significant market power in any market would be controlling for future rate filings unless shippers make a *prima facie* showing that competitive circumstances have changed."[217] Finally Buckeye asserts that

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[213] *Id.* P 142.

[214] *Id.* P 143.

[215] Buckeye Brief on Exceptions at 95.

[216] *Id.* (quoting *Buckeye Pipe Line Co., L.P.*, Opinion No. 360-A, 55 FERC ¶ 61,084, at 61,261 (1991)).

[217] *Id.* at 95-96. Buckeye also claims that the Presiding Judge erroneously found that, because the Commission had not previously analyzed the origin market, there is no basis for determining whether there were changed circumstances; Buckeye argues that this issue is moot because the Presiding Judge concluded that the Complainants failed to meet the more limited burden of proof as to the origin market. *Id.* at 97.

the Presiding Judge's ruling conflicts with the Commission's policy that a complaint must show a change in circumstances to change an approved rate.[218]

c. Briefs Opposing Exceptions

86. The Complainants and Trial Staff argue that the Presiding Judge correctly determined that a showing of changed circumstances is required for instituting a complaint against market-based rates and the Commission's Hearing Order already found that the Complainants met the required threshold burden.[219] The Complainants claim the record shows there have been significant changes in the ownership and operational status of pipelines that were considered to be competitive alternatives to Buckeye in its prior application, and there have also been significant changes in the Commission's methodology used to evaluate market power.[220] Trial Staff claims that while not required, material changes have occurred in competitive circumstances in the Harrisburg destination markets since 1990 that have rendered the market less competitive.[221]

d. Commission Determination

87. The Commission affirms the Presiding Judge's determination that the Complainants and Trial Staff did not bear an additional heightened evidentiary burden to demonstrate materially changed circumstances relative to the time the Commission originally approved Buckeye's market-based rates in the early 1990s. The Commission will allow a complaint challenging an oil pipeline's market-based rate authority that presents reasonable grounds for asserting that there have been substantial changes in competitive circumstances in the markets relative to the time of the prior proceeding that granted the pipeline's market-based rate authority, taking into account the time that has elapsed.[222] The complainant will bear the burden of proof to show that the pipeline's

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[218] *Id.* at 97.

[219] Complainants Brief Opposing Exceptions at 71-72; Trial Staff Brief Opposing Exceptions at 12-13.

[220] Complainants Brief Opposing Exceptions at 72-74.

[221] Trial Staff Brief Opposing Exceptions at 15-19.

[222] The Commission also has discretion to initiate an investigation into an oil pipeline's rates on its own motion under Section 13 of the Interstate Commerce Act, 49 U.S.C. app. § 13(2).

market-based rate authority should be revoked, but no additional evidentiary showing of material changed circumstances will be required.

88. The Hearing Order found that the Complainants made an adequate threshold showing that circumstances had changed sufficiently to warrant a hearing to consider the revocation of Buckeye's previously approved market-based rate authority. The Commission described the threshold evidentiary burden as follows: "While the Commission does not expect that a complaint will complete an entire market analysis similar to what is necessary in an application for market-based rates, the Commission does expect some analysis showing why some or all of the factors that led to a conclusion of a lack of market power are no longer present or relevant."[223] The Commission found that there was sufficient evidence of changed circumstances relative to the time of Buckeye's prior market-based rate proceeding, including substantial changes regarding the transportation options that were considered to be competitive alternatives to Buckeye in the original proceeding and changes in the Commission's methodology for measuring market power.[224] The Commission also found that there was no prior examination of whether Buckeye possessed market power in any origin market. Based on this evidence of substantial changes and the time elapsed (more than two decades), the Commission found that the Complainants met the threshold burden.[225] In light of the fact that the Commission's Hearing Order already found sufficient evidence of substantially changed circumstances to warrant setting the Complaint for hearing and the Complainants had the burden of proof to demonstrate that Buckeye possesses market power in the relevant markets, the Presiding Judge correctly held that imposing an additional heightened evidentiary burden would be improper.[226] Therefore, the Commission rejects Buckeye's argument that the Complainants should be required to meet an additional evidentiary burden to demonstrate material changed circumstances by addressing the circumstances that were identified by the Commission in the prior proceeding granting Buckeye's market-based rate authority.

89. Buckeye's reliance on the Commission's statement in Opinion No. 360 that "the Commission's finding that Buckeye lacks significant market power in any market would be controlling for future rate filings unless shippers make a *prima facie* showing that competitive circumstances have changed" is misplaced.[227] The Presiding Judge correctly

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[223] Hearing Order, 147 FERC ¶ 61,088 at P 40.

[224] *See* Complaint at 13-25 and attached Affidavit of Daniel S. Arthur.

[225] Hearing Order at PP 40, 44.

[226] Initial Decision at P 142.

[227] Buckeye Brief on Exceptions at 96-97 (quoting Opinion No. 360, 53 FERC ¶

explained that "this statement was made when the Commission was summarizing Buckeye's proposal."[228] The Commission terminated Buckeye's experimental rate program in 2013,[229] and thus the terms of the experimental rate program have no bearing on the evidentiary burden in this proceeding.[230]

90. We also reject Buckeye's argument that the Presiding Judge's ruling conflicts with the Commission's policy that a complaint must show a change in circumstances to change an approved rate. The issue of whether Buckeye's market-based rate authority should be revoked involves an investigation into whether the pipeline possesses significant market power in the relevant markets, not a rate investigation. Market-based rate authority is an exception to the indexing approach, and thus revoking Buckeye's market-based rate authority is not changing an approved rate as Buckeye claims.[231] Further, as the Presiding Judge found, the Complaint alleged substantial changes in circumstances sufficient to indicate that Buckeye may no longer lack market power in the relevant markets. As the Presiding Judge reasoned, if the Complainants meet their burden in the hearing proceeding to show that Buckeye can exercise market power in the relevant markets, "it can be assumed that circumstances in the market structure and competitive circumstances have changed since the Commission approved market-based rates."[232] Thus, there is no basis for Buckeye's claim that without its proposed additional evidentiary burden, the Presiding Judge could "reassess an existing rate, and on the same facts previously considered by the Commission, reach a different conclusion than the Commission."[233]

61,473 at 62,676).

[228] Initial Decision, 155 FERC ¶ 63,008 at P 140.

[229] *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140.

[230] The order terminating Buckeye's experimental program specifically provided that while "Buckeye will not have to re-qualify for market-based rates and will be allowed to continue to charge market-based rates," "this finding does not prevent a shipper from filing a complaint (with its attendant burden of proof) asserting that a market is no longer competitive because of changed circumstances and that Buckeye, in fact, does not lack significant market power." *Id.* P 14.

[231] *See* Order No. 572, FERC Stats. & Regs. ¶ 31,007.

[232] Initial Decision, 155 FERC ¶ 63,008 at P 141.

[233] Buckeye Brief on Exceptions at 97.

3. Standard for evaluating market power in cases challenging an oil pipeline's existing market-based rate authority

a. Introduction

91. As to the standard for evaluating Buckeye's market power, the Presiding Judge stated: "All parties agree that Order No. 572, *Seaway I*, *Seaway II*, and *Enterprise TE* apply to the proceedings where an oil pipeline is seeking market-based rate authority and does not already have market-based rate authority, but that this is a case of first impression because the Commission has never been presented with whether a pipeline's market-based rates should be revoked."[234] The Presiding Judge noted that "[a]ll of the Commission's guidance regarding market-based rates has been premised on the assumption that the subject pipeline's current tariff rates are at or below competitive levels because those pipelines were previously subject to Commission regulation."[235] The Presiding Judge concluded that "it is reasonable to apply only certain aspects of the Commission's market power framework because strictly applying all aspects of the Commission's market power framework, which was meant for pipelines that are currently subject to the Commission's regulation, could lead to inappropriately skewed results in a case to determine whether market-based rate authority should be revoked."[236] As discussed below, the Presiding Judge claimed to depart from prior Commission decisions regarding the obligation to identify the marginal supplier, and the assumption that used alternatives are good alternatives in terms of price.

92. Buckeye argues on exceptions that the Presiding Judge failed to provide a rational justification for departing from the Commission's instructions in its Hearing Order to apply the Commission's market-based rate framework as discussed in Order No. 572, *Seaway I* and *Seaway II*.[237] The Complainants and Trial Staff respond that while the Presiding Judge largely adhered to the Commission's established framework for evaluating market power, the Presiding Judge appropriately departed from the Commission's precedents regarding the proxy for the competitive rate and presumption

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[234] Initial Decision, 155 FERC ¶ 63,008 at P 145 (citing Order No. 572, FERC Stats. & Regs. ¶ 31,007; *Seaway I*, 146 FERC ¶ 61,115; *Seaway II*, 152 FERC ¶ 61,203; *Enterprise TE Products Pipeline Co. LLC*, Opinion No. 529, 146 FERC ¶ 61,157 (2014) *(Enterprise TE)*; *Enterprise TE Products Pipeline Co. LLC*, 141 FERC ¶ 63,020, at P 206 (2012)).

[235] *Id.* P 150.

[236] *Id.*

[237] Buckeye Brief on Exceptions at 12-18.

that used alternatives are good alternatives based on the circumstances of this case,[238] in particular that this proceeding involves a complaint challenging existing market-based rate authority whereas the Commission's prior orders addressed applications for market-based rate authority.[239]

b. Obligation to Identify the Marginal Supplier

i. Initial Decision

93. The Presiding Judge found that Buckeye's current market-based rates should be used as a proxy for the competitive rate in the SSNIP test.[240] The Presiding Judge reasoned that while prior decisions stated that it is improper to presume that the regulated rate of a pipeline seeking a market power determination is a valid proxy for the competitive rate, those decisions did not preclude a finding that the filed rate is a good proxy for competitive rates in a given case.[241] The Presiding Judge also found that *Seaway II* rested on the assumption that the applicant pipeline has regulated rates and does not already have market-based rate authority.[242] The Presiding Judge based her determination that the Complainants and Trial Staff did not have to identify a marginal supplier on her conclusion that "[t]he current presumptions in the Commission's framework for the applications requesting market-based rate authority by a pipeline simply do not apply in the context of the necessary analysis and facts in this proceeding."[243]

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[238] *See Seaway I*, 146 FERC ¶ 61,115; *Seaway II*, 152 FERC ¶ 61,203.

[239] Trial Staff Brief Opposing Exceptions at 21-23; Complainants Brief Opposing Exceptions at 19-20.

[240] As the Presiding Judge noted, the Commission has defined market power as the ability to profitably sustain a small but significant and non-transitory rate increase above a competitive level for a significant period of time, also known as the "SSNIP" test. Initial Decision, 155 FERC ¶ 63,008 at P 144 (citing *Enterprise TE*, 146 FERC ¶ 61,157 at P 14; *Mobil Pipeline Co. v. FERC*, 676 F.3d 1098, 1100 (D.C. Cir. 2012); *SFPP, L.P.*, 84 FERC ¶ 61,338, at 62,497 (1998); Ex. GP-8 at 7-9; Ex. GP-9).

[241] *Id.* P 207 (citing *Mobil Pipeline Co. v. FERC*, 676 F.3d at 1103; *Seaway II*, 152 FERC ¶ 61,203 at P 15).

[242] *Id.*

[243] *Id.* P 210.

94. The Presiding Judge determined that it was appropriate to use Buckeye's current rates for the competitive rate because "the evidence shows that Respondent's market-based rates are near profit maximizing levels, or may even be above competitive levels."[244] The Presiding Judge based this conclusion on two facts. First, the Presiding Judge stated that Buckeye's Form No. 6, Page 700 data indicated that its revenues significantly exceed its cost of service from 2011 to 2013. Second, the Presiding Judge observed that Laurel's intrastate rates for the same service provided by Buckeye were about the same as Buckeye's rates in the early 1990s when both rates were regulated, but Buckeye's rates have risen significantly since Buckeye obtained market-based rate authority while Laurel's rates remained the same.[245]

95. The Presiding Judge noted that the Commission's Rehearing Order "made clear that the 'only evidence that is considered in determining whether market-based rates are still valid is whether the pipeline no longer lacks market power in the relevant market and not whether the market-based rates exceed cost-based rates.'"[246] However, the Presiding Judge explained that "[t]he undersigned is not relying on the evidence regarding Respondent's over-recovery of costs and difference in rates between Respondent and Laurel to determine whether Respondent lacks market power" but rather "to support the finding that the current market-based rates are an appropriate proxy for the competitive rate in the SSNIP test . . . ."[247]

96. The Presiding Judge further found that the experimental rate program did not meaningfully constrain Buckeye's rates in a manner that prevented Buckeye from exercising the extent of its market power because Buckeye never came close to exceeding the rate cap (that prohibited real increases greater than 15 percent over a two-year period) and only exceeded the rate trigger (requiring Buckeye to justify an individual rate increase that was not below the GNP deflator plus 2 percent) on one occasion.[248] The Presiding Judge also noted that, "[w]hile the cellophane fallacy may not strictly apply in this proceeding because Respondent is not a true monopolist, it is certainly relevant

[244] *Id.* P 208.

[245] *Id.*

[246] *Id.* P 209 (quoting Rehearing Order, 149 FERC ¶ 61,103 at P 14).

[247] *Id.*

[248] *Id.* P 214.

where the evidence shows that Respondent's market-based rates may be above competitive levels."[249]

97. The Presiding Judge took into account statements from the parties' experts that it is difficult to identify the marginal supplier in practice.[250] Specifically, the Presiding Judge relied on an acknowledgement by Buckeye's expert, Dr. Carr, that in "real-world settings, accurately estimating profit-maximizing prices is a difficult problem whose solution requires a great deal of information/data about competitors' prices and costs, about customer preferences, and about how customers and competitors would respond to a price change."[251] The Presiding Judge also relied on Trial Staff's expert testimony that it is "very difficult to determine what the competitive price of transportation should have been if a market participant has potentially already exercised market power."[252]

98. After recognizing the difficulty of identifying the marginal supplier in the circumstances presented, the Presiding Judge reasoned that the Commission's directives in prior decisions regarding the duty to identify the marginal supply should not be strictly applied:

> The undersigned finds that there must be a balance in following the Commission's directives on requirements and assumptions used in its economic models to determine whether market-based rates are appropriate with how the application of such requirements and assumptions can affect an actual proceeding. If the undersigned were to strictly interpret that the Commission's directive in *Seaway I* and *Seaway II* requires a single marginal supplier for each destination market to be identified in each and every market-based rates case, when experts for each of the parties agree that identifying the marginal supplier would be difficult, if not impossible, then Complainants and Trial Staff could not meet their burden in this case despite showing why [Buckeye's] rates are appropriately identified as a proxy for the competitive rate. Therefore, the undersigned finds that, just as other elements of the market-power analysis, such as determination of the product market, geographic market, and competitive alternatives are fact-specific inquiries that must be determined on a case-by-case basis,[] the requirement

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[249] *Id.* P 215.

[250] Initial Decision, 155 FERC ¶ 63,008 at P 211 (citing Ex. BPL-88 at 8-9; Tr. 1907-20).

[251] *Id.* (quoting Ex. BPL-88 at 8-9).

[252] *Id.* (quoting Ex. S-5 at 13).

> to identify a single marginal supplier in order to determine the appropriate competitive rate also must be determined on a case-by-case basis. This is especially so in a case such as this one, where the pipeline is being analyzed from the position of already having market-based ratemaking authority and the question is whether the pipeline may already be exercising market power over its customers by imposing supracompetitive or otherwise profit-maximizing rates.[253]

99. Based on the above, the Presiding Judge held that it was unnecessary for the Complainants and Trial Staff to identify a single marginal supplier.[254]

ii. Briefs on Exceptions

100. Buckeye argues that the Presiding Judge failed to follow the Commission's market power framework by finding that it was not necessary for the Complainants to identify the marginal supplier and finding that Buckeye's current interstate tariff rate is a good proxy for the competitive rate and that Buckeye's rates may be above competitive levels.[255] Buckeye claims that the Presiding Judge misconstrued the Commission's prior precedents in *Seaway I* and *Seaway II* in finding that the Complainants may assume that Buckeye's rate is at a competitive level without any demonstration or proof. Buckeye argues that *Seaway I* and *Seaway II* recognize the potential that a regulated rate might be at the competitive level, but hold that the relationship between the applicant's rate and the competitive rate, or the marginal supplier's rate, cannot be presumed. Instead, it is necessary to determine what the competitive rate is, without assuming that the applicant's rate is at its competitive level.[256]

101. Buckeye asserts that the Presiding Judge improperly relied on the alleged difficulty of identifying the marginal supplier to conclude that the Complainants and Trial Staff need not identify the marginal supplier.[257] Buckeye argues that there is no evidence to support the conclusion that the burden to identify the marginal supplier is more

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[253] *Id.* P 212 (footnote omitted).

[254] *Id.*

[255] Buckeye Brief on Exceptions at 10, 12.

[256] *Id.* at 17-18.

[257] *Id.* at 18-21.

burdensome in a complaint case than in proceedings involving an application for market-based rate authority.[258]

102. Buckeye argues that the Presiding Judge relied on evidence that is not relevant to conclude that Buckeye's current rates could be presumed to be the competitive rate.[259] In particular, Buckeye claims the Presiding Judge relies on the fact that Buckeye has market-based rate authority, and a pipeline with market-based rates should be presumed to have set its rates at profit-maximizing levels. Buckeye argues that this is incorrect because, while a pipeline with market-based rates would have an incentive to set its rates so as to maximize profits, it cannot be presumed to have sufficient information to allow it to obtain this objective.[260] In addition, Buckeye asserts that unless the pipeline is the marginal supplier, the pipeline's profit-maximizing rates cannot be expected to be the competitive rate.[261]

103. Buckeye claims that the Presiding Judge relied on irrelevant evidence to find that Buckeye's rates may be above competitive levels, specifically (1) evidence of an over-recovery shown by cost-of-service data on Buckeye's Form No. 6, Page 700, and (2) a comparison of Buckeye's rates to Laurel's intrastate rates.[262] First, Buckeye states that the Form No. 6 data is not relevant because it reflects the entire system, rather than the rates or markets in question, and does not account for long-term expansion costs.[263] According to Buckeye, *Seaway II* held that the only instance in which the costs of the pipeline will be considered is when that pipeline is the marginal supplier, but the Presiding Judge found it unnecessary for the Complainants and Trial Staff to make such a finding.[264] Second, Buckeye argues that no conclusions regarding the level of the interstate rates relative to their competitive level can be drawn from the fact that interstate and intrastate rates differ.[265] In addition, Buckeye argues that the Presiding Judge's

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[258] *Id.* at 18-19.

[259] *Id.* at 22-26.

[260] *Id.* at 22 (citing Ex. BPL-88 at 8-10).

[261] *Id.*

[262] *Id.* at 22-23.

[263] *Id.* at 27 (citing *Seaway II*, 152 FERC ¶ 61,203 at P 44).

[264] *Id.*

[265] *Id.* at 28-29.

finding that the cellophane fallacy is relevant is incorrect and contrary to *Seaway II*,[266] because Buckeye maintains it is not a monopolist, its rates were subject to regulatory constraint, and there is no evidence that its rates may be above competitive levels.[267]

104. Buckeye argues that if the Commission accepts the Presiding Judge's departure from the Commission's standards based on the rationales discussed above, it would impose a significantly reduced burden and less rigorous factual analysis in complaint proceedings against existing market-based rates, as opposed to applications for market-based rates.[268]

iii. Briefs Opposing Exceptions

105. The Complainants and Trial Staff argue that the Presiding Judge correctly concluded that Buckeye's existing tariff rates are an appropriate proxy for a competitive transportation rate.[269] They assert that the Presiding Judge's decision is well supported by evidence that Buckeye's existing interstate rates are at or above a competitive level.[270]

106. Trial Staff argues that the Presiding Judge correctly found that it would be inappropriate to rely on the marginal supplier to determine the competitive rate proxy based on the specific facts and circumstances of this case, as prevailing prices may exceed competitive levels.[271] In addition, Trial Staff argues that there are practical limitations to basing the competitive rate proxy on a single marginal supplier to the entire market.[272] Trial Staff argues that the lack of central clearing mechanisms in refined products destinations markets, prevalence of one-on-one dealings between suppliers and

[266] 152 FERC ¶ 61,203.

[267] Buckeye Brief on Exceptions at 23-26.

[268] *Id.* at 40-41.

[269] Complainants Brief Opposing Exceptions at 19-29; Trial Staff Brief Opposing Exceptions at 24-36.

[270] Complainants Brief Opposing Exceptions at 29-34; Trial Staff Brief Opposing Exceptions at 24-33.

[271] Trial Staff Brief Opposing Exceptions at 31, 33-36.

[272] *Id.* at 34-35.

purchasers, and significant day-to-day swings in the price of delivered products make it difficult to reliably determine the marginal supplier.[273]

107. The Complainants argue that Buckeye mischaracterizes Commission precedent regarding the role of identifying the marginal *transportation* supplier, as opposed to the marginal *commodity* supplier.[274] The Complainants claim that similar transportation services must be examined in order to identify the marginal transportation supplier.[275] According to the Complainants, because Sunoco ceased to provide transportation service from Philadelphia to Harrisburg and Pittsburgh, and only Buckeye still does, Buckeye is the marginal transportation supplier.[276] Finally, the Complainants argue that the Presiding Judge correctly recognized that performing an analysis that examines consumers' willingness to substitute at existing rates that may reflect an exercise of market power tilts the analysis toward finding more competitive alternatives.[277]

iv. Commission Determination

108. The Commission affirms the use of Buckeye's current market-based rate as an appropriate proxy for the competitive rate in the SSNIP test. As the Commission ruled in *Seaway I*, an accurate competitive price proxy is a fundamental element of a detailed price analysis.[278] As noted by the Presiding Judge, prior Commission cases have been premised on the assumption that the subject pipeline's current tariff rate was at or below competitive levels because the pipelines were subject to rate regulation.[279] In a complaint case against a pipeline with existing market-based rate authority, however, it can be assumed that the pipeline is currently charging a rate at, if not above, the competitive level. The Commission agrees with the Presiding Judge that pipelines, like most firms, are profit maximizers that will set rates at the level to earn the highest profits.[280] While in

[273] *Id.* (citing Tr. 1908-18, 1921-23; Ex. BPL-88 at 8-9).

[274] Complainants Brief Opposing Exceptions at 19-29.

[275] *Id.* at 26 (citing Tr. 907-922).

[276] *Id.* at 28 (citing Tr. 762-763, 788-789).

[277] *Id.* at 34.

[278] *Seaway I*, 146 FERC ¶ 61,115 at P 67.

[279] Initial Decision, 155 FERC ¶ 63,008 at P 150.

[280] *Id*. P 213.

the *Seaway* proceedings the Commission identified why a current regulated tariff rate could not be presumed an appropriate proxy for the competitive price, the same concerns are not present when using the prevailing price of a pipeline with market-based rate authority.

109. The Commission notes that while utilizing a current market-based rate may, as discussed below, lead to an improper expansion of markets and the inclusion of improper competitive alternatives, the Complainants' use of such a proxy to meet their burden in this proceeding to show the presence of market power was appropriate. Adopting such a proxy is a conservative choice, as any potential concerns raised by utilizing a prevailing unregulated price will only increase the burden faced by the Complainants.[281] If the Complainants were successful in showing market power using a competitive price proxy that potentially expanded the list of good alternatives beyond what would be present in a competitive market, any inherent flaw in such a proxy would not alter the Commission's final determination of the existence of market power.

110. While the use of Buckeye's current market-based rates as a competitive price proxy was appropriate, the Presiding Judge erred in certain reasoning in support of such usage and in certain interpretations of Commission precedent. Specifically, the Presiding Judge erred in her determination that Commission precedent required the specific identification of a marginal supplier, and erred as to the relevance of certain cost data in determining the appropriateness of the Complainants' proxy.

111. The Presiding Judge found that Commission precedent required that a marginal supplier be identified in every market-based rate proceeding.[282] However, the Commission does not require that a marginal supplier be identified in each and every market-based rate proceeding. The Presiding Judge's error stems from a misunderstanding of the Commission's *Seaway* orders. In *Seaway*, the Commission addressed the issue of identifying an appropriate proxy for the competitive price in analyzing an application for market-based rate authority.[283] Two fundamental holdings come from *Seaway* concerning the "need" to identify a marginal supplier. The first is that a detailed cost analysis is not required by an applicant for market-based rate

[281] While Buckeye's market-based rates were subject to some constraints under the experimental rate program, as described below, the rate cap and trigger did not prevent Buckeye from charging rates at, if not above, the competitive level.

[282] *Id.* P 211.

[283] *Seaway II*, 152 FERC ¶ 61,203 at P 15.

authority.[284] The second is that if a detailed cost analysis is performed, the proper competitive price proxy (in an origin market analysis) is one that would generate the marginal netback.[285] The Commission did not, contrary to the language of the Initial Decision, require a single marginal supplier for each destination market be identified in each and every market-based rate proceeding.[286]

112. Parties may utilize a detailed price analysis for determining geographic markets and good alternatives in market-based rate proceedings, but such an analysis is not required. Since the issuance of Order No. 572, the Commission has not required an oil pipeline to file pursuant to any particular geographic market definition or methodology.[287] Further, while competitive alternatives must be competitive in terms of price, in the *Seaway* proceedings the Commission ruled that the usage of an alternative by a shipper demonstrated the economic viability of the alternative.[288] A detailed cost analysis was only necessary if a participant sought to include unused alternatives as good alternatives.[289] There is no requirement that a detailed cost analysis be undertaken in every market-based rate proceeding involving oil pipelines.

113. Absent a need to perform a detailed cost analysis, there is no requirement to specifically identify a marginal supplier. Geographic markets may be defined by use of BEAs,[290] for example, which does not require the identification of a marginal supplier. Concerning competitive alternatives, when utilizing usage as the competitive price proxy, as set forth in *Seaway*, it is understood that one of the used alternatives will generate the marginal netback or delivered price. Identifying which specific alternative is the marginal supplier, however, is not required.

114. When parties do voluntarily choose to utilize a detailed cost analysis, it is not strictly marginal costs that must be analyzed when determining an appropriate price

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[284] *Seaway I*, 146 FERC ¶ 61,115 at P 67.

[285] *Id.* P 69.

[286] Initial Decision, 155 FERC ¶ 63,008 at P 212.

[287] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188.

[288] *Seaway I*, 146 FERC ¶ 61,115 at P 56.

[289] *Id.* P 65.

[290] The term BEA refers to United States Department of Commerce, Bureau of Economic Analysis Economic Areas.

proxy, but instead who is the marginal supplier.[291] While the data required to determine actual marginal costs of every market participant (or potential market participant) may be difficult to acquire, as stated by the Presiding Judge,[292] identifying the marginal netback or marginal delivered price does not raise the same evidentiary hurdles. Information on transportation rates and commodity prices should be publically available. The methodologies and data requirements for calculating netbacks and delivered price have remained consistent since the issuance of Order No. 572. In discussing marginal costs in *Seaway II*, for example, the costs at issue were those set forth in the tariff, which are publically available.[293] Utilizing such public and available information in a market power analysis is consistent with the requirements of Order No. 572, which stated that the data required to make a market power determination is only that data which is publically available, unless the party has access to additional information, or otherwise the best estimates.[294] The Presiding Judge erred in stating that identifying a marginal supplier is required in all market-based rate cases, and overstated the difficulty inherent in making such an identification when participants chose to do so.

115. In discussing whether Buckeye's current rates are an appropriate proxy for the competitive price, the Presiding Judge made two findings concerning those rates that involve an analysis of cost data. The Presiding Judge stated that not only is it possible that Buckeye's current rates are above the competitive level, but it is likely that they are above the competitive level. In support, the Presiding Judge argued that because Buckeye's Form No. 6 shows that its revenues significantly exceed its cost of service, its market-based rates at issue in this proceeding are likely above the competitive level.[295] The Presiding Judge also compared Buckeye's interstate market-based rates with Buckeye's cost-based intrastate Laurel rates that involve the "exact same service to the exact same origin and destination points."[296] The Presiding Judge found that the fact that Buckeye's interstate market-based rates have risen significantly while the cost-based

[291] Ex. S-5 at 22-24.

[292] Initial Decision, 155 FERC ¶ 63,008 at P 211.

[293] *Seaway II*, 152 FERC ¶ 61,203 at PP 40-47.

[294] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.

[295] Initial Decision, 155 FERC ¶ 63,008 at P 208.

[296] *Id*.

intrastate rates have remained unchanged is evidence that Buckeye's market-based rates are set above the competitive level.[297]

116. The Commission rejects these findings. The Commission, as well as the courts, have consistently held that a divergence between cost and revenue does not in and of itself demonstrate that a pipeline's rates are above the competitive level.[298] In *Mobil*, the court found that the ability to raise rates more than fifteen percent above a pipeline's cost-based rate was not, in and of itself, evidence that the pipeline possessed market power.[299] In *Seaway*, the Commission, citing *Mobil*, found that a pipeline's regulated rate could be below, even far below, a competitive price level.[300] While an exercise of market power will undoubtedly add to a divergence between a pipeline's costs and revenues, such a divergence alone is not sufficient evidence that such an exercise has occurred. Further, a significant divergence between a market-based rate and a cost-based rate, including a cost-based intrastate rate utilizing the same facilities, is not in itself proof of the existence of market power.

117. This is not to say that data on costs and revenues are wholly irrelevant to the regulation of pipelines currently possessing market-based rate authority. In Order No. 572, the Commission, in discussing the monitoring of pipelines granted market-based rate authority, stated that it could adequately monitor market-based rates through price changes in filed rates, as well as by monitoring an oil pipeline's aggregate earnings through its Form No. 6 filing.[301] By reviewing Form No. 6 data, the Commission can identify pipelines charging market-based rates that are reporting a divergence between costs and revenues in aggregate earnings. Such pipelines may require investigation to determine whether the divergence between costs and revenues was caused in whole or in part by the acquisition of market power since the grant of market-based rate authority.

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[297] *Id*.

[298] *Seaway I*, 146 FERC ¶ 61,115; *Mobil Pipe Line Co. v. FERC*. 676 F.3d 1098, *U.S. v. Eastman Kodak Co*., 63 F.3d 95, 109 (2d Cir. 1995) ("Certain deviations between marginal cost and price, such as those resulting from high fixed costs, are not evidence of market power."); *In re Wireless Te. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 422 (S.D.N.Y. 2005) (The test for the existence of market power is the ability to control price or exclude competition, not simply pricing a product above marginal cost.)

[299] *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1103 (D.C. Cir. 2012).

[300] *Seaway I*, 146 FERC ¶ 61,115 at P 51 (citing *Mobil Pipe Line Co. v. FERC*, 676 F.3d at 1103).

[301] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187.

118. While a divergence between costs and revenues is a likely and perhaps necessary outcome of an exercise of market power, a divergence between cost and revenue as currently reported on Form No. 6 is not a sufficient element alone to establish that market power is being exercised. Form No. 6 is currently reported on a system-wide basis. Any divergence between cost and revenue reflected in Form No. 6 cannot in and of itself demonstrate that the market-based rate revenue reported as part of system-wide revenue is derived from supra-competitive prices. An investigation involving a specific and detailed analysis of the market-based rates in question is where the existence of market power is proven. The likelihood that a current market-based rate is derived by an exercise of market power is not influenced by the cost and revenue data currently reported on a pipeline's Form No. 6.

119. The Commission notes that the investigation into existing market-based rate authority is not to determine whether the current rate is above the competitive level. The Commission seeks to determine whether a pipeline has the potential to exercise market power in a particular market, not whether it has in fact been exercised. Potential market power, especially in an industry with significant barriers to entry, is determined primarily by market share and market concentration calculations.[302] A pipeline with unacceptably high market share and market concentration numbers will have its market-based rate authority revoked regardless of whether the pipeline has exercised that power in the form of supra-competitive rates. Further, that a current market-based rate is not at a supra-competitive level is not a sufficient defense against an allegation of market power. In other words, just as over-recovery does not prove a pipeline possesses market power, the absence of over-recovery does not establish an absence of market power.[303]

c. Assumption that Used Alternatives are Good Alternatives

i. Initial Decision

120. The Presiding Judge stated:

> If there is evidence that supports a finding that a pipeline is already charging rates near a profit-maximizing level, or even above competitive levels, then applying the Commission's current market power framework, which assumes that all currently used alternatives are good alternatives, may skew

[302] *See Harrison Aire, Inc. v. Aerostar Intern., Inc.*, 423 F.3d 374, 381 (3d Cir. 2005); *see also U.S. v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

[303] The Commission also recognizes that a supra-competitive market price may be the result of an exercise of market power by an alternative other than the pipeline. A rising tide lifts all boats.

> the results in favor of finding that [Buckeye] lacks market power because it would overstate the competitiveness of the relevant market.[304]

121. Based on the Presiding Judge's conclusion that Buckeye's rates may be above competitive levels discussed above, the Presiding Judge determined that the Commission's presumption that a used alterative is a good alternative need not be applied in this proceeding.[305]

ii. Briefs on Exceptions

122. Buckeye argues that the Presiding Judge improperly departed from the Commission's market power framework by rejecting the principle that a used alternative is a good alternative.[306] Buckeye's arguments regarding the finding that Buckeye's rates may be above competitive levels and obligation to identify the marginal supplier discussed above also apply to the Presiding Judge's determination that the presumption that a used alterative is a good alternative need not be applied in this proceeding.

iii. Briefs Opposing Exceptions

123. The Complainants and Trial Staff argue that the Presiding Judge correctly concluded that a presumption that used alternatives are competitive alternatives is not warranted in this proceeding.[307] Trial Staff also asserts that while the Presiding Judge found that it is not appropriate to strictly adhere to the presumption that used alternatives are good alternatives, she nonetheless appears to rely on proof of use as persuasive evidence that alternatives are competitive alternatives.[308]

iv. Commission Determination

124. In the *Seaway* proceedings, the Commission determined that when analyzing a market containing alternatives offered at a regulated, cost-based rate, shipper behavior could implicitly demonstrate that an alternative was a good alternative in terms of

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[304] Initial Decision, 155 FERC ¶ 63,008 at P 210.

[305] *Id.* P 220.

[306] Buckeye Brief on Exceptions at 10, 12, 41-42.

[307] Complainants Brief Opposing Exceptions at 14; Trial Staff Brief Opposing Exceptions at 33-34.

[308] Trial Staff Brief Opposing Exceptions at 20 (citing Initial Decision, 155 FERC ¶ 63,008 at P 33).

price.[309] By using an alternative, the shipper demonstrated the economic viability of the alternative as well as showed that the alternative provided a better netback than an available but unused alternative. If an alternative was in fact being used, it provided at least the marginal netback to shippers and therefore was a good alternative in terms of price.[310] As the Commission discussed at length in *Seaway II*, the assumption that a used alternative was a good alternative in terms of price was predicated on the market containing alternatives that offered a regulated, cost-based rate.[311]

125. In the present proceeding, the market contains alternatives offering market-based rates, including Buckeye. In such a market, it cannot be assumed that a used alternative is a good alternative in terms of price. This is due to the fact that the current market rate could already reflect an exercise of market power. Markets that currently reflect supra-competitive rates may include alternatives that would not exist in the market if rates reflected the lower, competitive price.[312] Thus, alternatives that may be utilized solely due to price increases resulting from an exercise of market power cannot be assumed to be good alternatives in terms of price. By failing to consider whether a prevailing rate is already at a supra-competitive level due to an exercise of market power, one may fall into the "cellophane trap."[313]

126. Buckeye argues that the Commission in *Seaway II* described why the factual premises present in an oil pipeline proceeding make the possibility of the cellophane

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[309] *Seaway I*, 146 FERC ¶ 61,115 at P 56.

[310] *Id*.

[311] *Seaway II*, 152 FERC ¶ 61,203 at PP 27-28.

[312] *Id*. P 24.

[313] *Id*. PP 20-22. The cellophane trap or cellophane fallacy describes a type of incorrect reasoning used in market power analyses. The term arose in *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377 (1956). The fallacy arises where a firm sells a product with few substitutes, which in turn allows the firm to increase the price of that product. The decision has been invoked when referring to a potential flaw in market analyses that fail to evaluate whether demand elasticity is a result of a company already charging a monopoly price, which would increase the likelihood that consumers would switch from one product to another but would not be indicative of a competitive market. *Seaway II*, 152 FERC ¶ 61,203 at P 22 (citing *U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 105 (2d Cir. 1995)).

fallacy occurring "exceedingly unlikely."[314] Buckeye however mischaracterizes the Commission's *Seaway* decisions in arguing that the cellophane trap does not apply to oil pipeline proceedings. The Commission's discussion of the cellophane fallacy in *Seaway II* focuses on how, in a situation involving regulated market participants, the likelihood that utilizing usage as a proxy for the competitive price will result in the cellophane fallacy is extremely limited.[315] This is due to the constraints that price regulation place on a market participant, preventing the ability to charge a supra-competitive price necessary for the cellophane fallacy to occur.

127. In the present case the market does not consist of alternatives with rates constrained by regulation. While some level of price cap did exist for Buckeye, it did not in fact constrain its ability to raise rates to the point that the cellophane fallacy is not a concern. The Commission affirms the Presiding Judge's finding that Buckeye's experimental rate program did not meaningfully constrain Buckeye's rates in a manner that prevented a potential exercise of market power.[316]

4. Delivered Price Test

a. Initial Decision

128. The Presiding Judge explained the purpose of a delivered price test as follows:

> A delivered price test compares the total cost of supplying product to a destination from multiple supply sources. The first step in a delivered price test is to identify the geographic area where the terminals supplied by the subject pipeline are competitive, which is done by comparing the delivered price of product delivered to a county from the terminals supplied by the subject pipeline to the delivered price of product delivered to the same county from other supply sources. If the calculated cost of delivered product from a terminal supplied by the subject pipeline to the county is less than or equal to the competitive price, that county is included in the geographic market. The second step in a delivered price test is to determine the set of good alternatives to the subject pipeline for the customers in the relevant geographic market. All alternatives with a delivered price less than or equal to the competitive level, assuming they are comparable in quality and availability, are considered good alternatives. A threshold price increase—

[314] Buckeye Brief on Exceptions at 23.

[315] *Seaway II*, 152 FERC ¶ 61,203 at PP 26-28.

[316] Initial Decision, 155 FERC ¶ 63,008 at P 214.

> the SSNIP—is then added to the competitive price to determine if the alternatives could prevent the subject pipeline from raising its prices above the competitive level if granted market-based rate authority. All alternatives with a delivered price less than or equal to the competitive level plus the SSNIP are considered good alternatives. The set of counties served by the subject pipeline and the set of good alternatives are then used to compute the HHI market share and market concentration statistics.[317]

129. The Presiding Judge adopted the delivered price test proposed by the Complainants' expert witness, Dr. Arthur, and rejected the delivered price test of Buckeye's expert witness, Dr. Schink. The Presiding Judge found that the Commission declined to adopt Dr. Arthur's delivered price test in *Enterprise TE*,[318] because he failed to provide any allowance for non-price factors and merely assumed that the pipeline's rates were a good proxy for competitive rates. Here, the Presiding Judge found that Dr. Arthur had modified his methodology to sufficiently address those issues by including two allowances for non-price factors and providing an explanation for why Buckeye's rates are an appropriate proxy for competitive rates.[319] The two allowances for non-price factors recognized by the Presiding Judge are (1) basing the competitive price for each county on the highest delivered price among the terminals that are in the terminal cluster with the lowest delivered price to that county, and (2) identifying other good alternatives by adding a SSNIP based on 15-25 percent of the highest Buckeye tariff to the destination market to the competitive price of each county.[320] The Presiding Judge's finding that Buckeye's rates are an appropriate proxy for the competitive rate is addressed above.

130. The Presiding Judge rejected Buckeye's argument that Dr. Arthur's capacity sufficiency check in his delivered price test was rejected in *Enterprise TE*.[321] The Presiding Judge found that Dr. Arthur's delivered price test was rejected in *Enterprise TE*

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[317] *Id.* P 203 (citing Ex. S-5 at 17-18, 20-24; Ex. GP-2 at 12-14).

[318] 146 FERC ¶ 61,157.

[319] Initial Decision, 155 FERC ¶ 63,008 at PP 206, 216.

[320] *Id.* P 216.

[321] *See id.* PP 190-191 (Complainants' explanation of Dr. Arthur's capacity sufficiency test).

because he did not incorporate any allowances for non-price factors, rather than performing a capacity check.[322]

131. The Presiding Judge found that Dr. Schink's methodology was rejected in *Enterprise TE* because Dr. Schink failed to consider the pipeline's transportation rate. The Presiding Judge concluded that Dr. Schink's methodology should also be rejected here because Dr. Schink continued to base his threshold price increase on the total delivered price of the product, rather than the transportation rate component of that price.[323]

b. Briefs on Exceptions

132. On exceptions, Buckeye argues that the Presiding Judge erred in accepting Dr. Arthur's delivered price test methodology. Buckeye claims that Dr. Arthur's delivered price test criteria does not appropriately account for non-price factors and therefore, does not resolve the deficiency identified in *Enterprise TE*. As described in more detail below, Buckeye asserts that Dr. Arthur failed to provide any justification for how his trucking cost differential and 15 percent increase in Buckeye's tariff rate accounts for non-price factors.[324]

133. Buckeye claims that Dr. Arthur's trucking cost differential fails to account for differences in non-price factors among the destination market supply alternatives.[325] Dr. Arthur defines trucking cost differential as the difference in trucking cost between the lowest delivered price terminal and the most distant terminal in the lowest delivered price terminal's cluster. Buckeye argues that "differences in trucking costs between terminals in the same terminal cluster have no relationship to non-price factors on buyer behavior such as volume discounts, supply availability, desirability of maintaining multiple suppliers, and differences in commercial terms and conditions."[326] Buckeye further argues that Dr. Arthur does not explain how the trucking cost differential accounts in any way for non-price factors, makes no attempt to assess the actual purchase behavior of

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[322] *Id.* P 218.

[323] *Id.* P 205.

[324] Buckeye Brief on Exceptions at 42-57, 81.

[325] *Id.* at 48-49.

[326] *Id.* at 45-46, 49.

market participants, and provides no evidence that his approach takes into account real-world behavior.[327]

134. Buckeye claims that Dr. Arthur's trucking cost differential is flawed because Dr. Arthur incorrectly assumes that the only relevant differences between the delivered prices to a county from the terminals included in the terminal cluster containing the lowest delivered price terminal to the county are differences in trucking costs to the county, and fails to account for the differences between the low rack prices at the terminals in a terminal cluster.[328] Buckeye also claims that the degree to which Dr. Arthur adjusts for non-price factors is determined by the degree to which the individual terminals in a cluster are geographically dispersed, and is therefore arbitrary and irrational.[329]

135. In addition to challenging the trucking cost differential, Buckeye argues that Dr. Arthur failed to explain how his second non-price adjustment, his *SSNIP* or a 15 percent increase in Buckeye's tariff rate, reflects non-price factors. Buckeye argues that a 15 percent adjustment of the pipeline's tariff rate is not sufficient to comply with *Enterprise TE*, and that Dr. Arthur failed to address *Enterprise TE*'s instruction to account for non-price factors other than "checking the box" "without any coherent rationale."[330] Buckeye claims that Dr. Arthur's *SSNIP* does not provide a meaningful allowance for non-price factors because it either equals zero or 15 percent of Buckeye's highest tariff rate and neither figure has any relationship to non-price factors.

136. Buckeye argues that Dr. Schink's delivered price test criterion appropriately accounted for non-price factors using 1.3 percent of the lowest delivered price to the county, representing the range of wholesale gasoline prices paid by market participants. Buckeye argues that Dr. Schink's 1.3 percent competitive range is a direct measurement of the degree to which the market participants value non-price factors in their buying decisions.[331] Buckeye claims that Dr. Schink's use of a *SSNIP* equal to zero in his identification of good alternative to Buckeye is appropriate and conservative because a

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[327] *Id.* at 45-46, 49-50.

[328] *Id.* at 51-52 (citing Tr. 1444-1446; Ex. BPL-1 at 82-87; Ex. BPL-31 at 1, 3, 9-11; Ex. BPL-32 at 10, Table 2).

[329] *Id.* at 51-52.

[330] *Id.* at 52-53.

[331] *Id.* at 48.

positive *SSNIP* can only increase the number of terminals that are identified as good alternatives in the destination market counties.[332]

137. Buckeye claims that Dr. Arthur failed to justify a marginal supplier, instead relying on Buckeye's rates as a competitive proxy, and did not follow the Commission's directive in *Seaway* that used alternatives are good alternatives.[333] Buckeye claims that Dr. Arthur's *SSNIP* value is not appropriate because Dr. Arthur calculates the *SSNIP* based on Buckeye's highest current tariff rate into the destination market rather than the competitive price.[334] Buckeye argues that Buckeye's highest tariff rate cannot be presumed to be the competitive rate. Buckeye also states that Dr. Arthur relied exclusively on his delivered price test analysis to determine good alternatives. As such, Buckeye claims Dr. Arthur eliminated alternatives that did not conform to his delivered price test criteria without determining if any excluded alternatives were in fact being used and ignoring evidence that excluded alternatives were being used.[335]

138. Buckeye claims that Dr. Arthur's delivered price test methodology produced results that conflict with observed market behavior. Buckeye asserts that Dr. Arthur admitted that he failed to calibrate his model to actual market behavior.[336] Buckeye also provides three examples to illustrate its claim that Dr. Arthur's methodology fails to reflect market behavior and produces inaccurate results. The first relates to the United Refining Company in Warren, Pennsylvania (Warren Refinery). Buckeye states that Dr. Arthur excludes Warren Refinery volumes in the Pittsburgh destination market even though evidence shows that the refinery supplies portions of that market.[337] Second, Buckeye argues that Dr. Arthur improperly assigned a high market share to the closed Lancaster terminal in the Harrisburg destination market.[338] Buckeye states that the impact of removing the Lancaster terminal on Dr. Arthur's results demonstrates his

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[332] *Id.* at 48.

[333] *Id.* at 42-59.

[334] *Id.* at 47.

[335] *Id.* at 53-54, 58.

[336] *Id.* at 55 (citing Tr. 732-739).

[337] *Id.* (citing Tr. 860-865; Ex. BPL-1 at 43; Ex. BPL-9 at 4).

[338] *Id.* (citing Tr. 1638-1640, 1643-1649).

methodology is flawed.[339] Third, Dr. Arthur excluded trucks from Baltimore and Philadelphia in the Harrisburg destination market, despite acknowledging that there appeared to be deliveries by truck from Baltimore and Philadelphia to the Harrisburg destination market.[340]

139. Buckeye claims that Dr. Arthur unrealistically assumes that wholesale gasoline markets are perfectly competitive. Buckeye argues that Dr. Arthur's methodology, including the two-part capacity sufficiency test, was rejected in *Enterprise TE* for this reason.[341] Finally, Buckeye argues that the Presiding Judge failed to acknowledge that Dr. Arthur's methodology is undercut by data for the Pittsburgh destination market.[342]

c. Briefs Opposing Exceptions

140. The Complainants and Trial Staff argue that Dr. Arthur's delivered price test methodology reasonably incorporates two allowances for non-price factors sufficient to respond to the concerns expressed in *Enterprise TE*.[343] In addition, the Complainants claim that Dr. Arthur and Dr. Schink both relied on wholesale price data from the Oil Price Reporting Agency (OPIS), which accurately reports prices for a cluster of terminals, not individual terminals.[344] In addition, the Complainants contest Buckeye's claims regarding the Warren Refinery, Lancaster terminal, and truck deliveries from Baltimore and Philadelphia terminals.[345]

d. Commission Determination

141. The Commission affirms the Presiding Judge. Dr. Arthur's delivered price test utilizes an appropriate competitive price proxy, as discussed above, incorporates the preferred 15 percent SSNIP, and sufficiently provides an allowance for non-price factors in the analysis. The Commission affirms the Presiding Judge's ruling that Dr. Arthur

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[339] *Id.* at 56 (citing Ex. GP-117 at 167, *compare* Ex. GP-99 at 167-169).

[340] *Id.* (citing Tr. 905-907).

[341] *Id.* at 57-58.

[342] *Id.* at 59 (citing Ex. BPL-65; Tr. 1124-1128).

[343] Complainants Brief Opposing Exceptions at 7; Trial Staff Brief Opposing Exceptions at 37-38.

[344] Complainants Brief on Exceptions at 13-14, 17-18.

[345] *Id.* at 14-17.

sufficiently modified his methodology to address the flaws found by the Commission in *Enterprise TE*.[346]

142. Dr. Arthur adequately addressed non-price factors by basing his competitive price proxy for each county on the highest delivered price among the terminals that are in a terminal cluster with the lowest delivered price to that county, and by identifying other good alternatives by adding a SSNIP based on 15-25 percent of the highest Buckeye tariff to the destination market to the competitive price for each county.[347] The term "non-price" is something of a misnomer, but the requirement that non-price factors be taken into account merely reflects the common sense notion that market participants do not look solely at transportation rates and commodity prices when making purchasing decisions. Further, companies often compete in both price and non-price values. In an economic sense anything that influences purchasing decisions can be given a monetary or "price" value, so non-price may not be the best descriptive term. However, there are considerations not reflected in prevailing market prices that still affect whether an alternative will be utilized. In *Enterprise TE*, the Commission found that a market power analysis should recognize this fact and not be too strict in tying price to purchasing behavior.[348] For example, a purchaser of gasoline may pay more for the product if transportation of that product is more convenient. Conversely, a purchaser may forgo saving a small amount by purchasing from a certain provider if such a purchase requires travelling a precarious path. Dr. Arthur recognizes this in his analysis by including alternatives clustered near those that satisfy a strict SSNIP. The Commission concurs with the Presiding Judge that Dr. Arthur's incorporation of non-price factors results in his test not assuming a perfectly competitive market.[349]

143. The Commission once again rejects Dr. Schink's delivered price test using 1.3 percent of the lowest delivered price, affirming the Presiding Judge's determination that the methodology is fundamentally flawed.[350] The Commission held in *Enterprise TE* that the relevant rate in conducting a SSNIP is the transportation rate, not the price of

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[346] Initial Decision, 155 FERC ¶ 63,008 at P 206 (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 42). The application of Dr. Arthur's methodology to specific alternatives, mainly the Warren Refinery, the Lancaster terminal and trucking from Baltimore and Philadelphia, are discussed below.

[347] *Id.* P 216.

[348] *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 45.

[349] Initial Decision, 155 FERC ¶ 63,008 at P 216.

[350] *Id*. P 205.

gasoline.[351] As the Presiding Judge correctly states, Dr. Schink continues to base his threshold price increase on a total delivered price of the product, rather than the transportation rate component of that price.[352] While changes to the methodology were made, they were insufficient to cure what the Commission identified in *Enterprise TE* as the "fundamental error" in the methodology; it fails to address the fact that a competitive final price for refined products may contain an unjust and unreasonable, or supra-competitive, transportation rate.[353]

5. Dr. Carr's Linear Attraction Model

a. Initial Decision

144. The Presiding Judge explained that Buckeye presented a linear attraction model sponsored by Dr. Carr to show that Buckeye could not profitably sustain rates above a competitive level. The Presiding Judge described the model as follows:

> The purpose of Dr. Carr's linear attraction model was to demonstrate the impact of a 15% rate increase on [Buckeye's] current transportation rates into Harrisburg. Dr. Carr's linear attraction model encompassed three steps. First, a set of equations and mathematical relationships was specified that related [Buckeye's] market share in a county to the delivered prices of all active market participants in the county. Then [Buckeye's] calculated market share was used to calculate [Buckeye's] delivered volume to the county. Second, the model was calibrated based on [Buckeye's] known delivery volumes. Third, the delivered prices used in the model were adjusted by adding an assumed delivery price increase for the volumes supplied by [Buckeye].[354]

The Presiding Judge noted that Dr. Carr submitted three versions of the model, which each "found that [Buckeye] could not profitably raise its rates above current levels because [Buckeye] would suffer an adverse impact from a 15% rate increase."[355]

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[351] *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 42.

[352] Initial Decision, 155 FERC ¶ 63,008 at P 205.

[353] *See Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 42.

[354] Initial Decision, 155 FERC ¶ 63,008 at P 239 (citing Ex. BPL-37 at 31).

[355] *Id.* P 240 (citing Ex. BPL-37 at 32-33; Ex. BPL-88 at 17; Tr. 1494).

Buckeye claimed that Dr. Carr's model demonstrated that Dr. Schink's competitive range of 1 to 2 percent of the lowest delivered price is appropriate.[356]

145. The Presiding Judge rejected Dr. Carr's linear attraction model. The Presiding Judge agreed with the Complainants and Trial Staff that Dr. Carr's linear attraction model is similar to the linear scoring model presented by Dr. Schink in *Enterprise TE* that was rejected by the Commission in that case. The Presiding Judge observed that "Dr. Carr's linear attraction model relies on the assumption that all alternatives with delivered prices within 1.3 percent of the lowest delivered price alternatives are competitive supply sources to a county."[357] The Presiding Judge found this approach similar to Dr. Schink's assumed competitive range of 1 to 2 percent above the lowest delivered price, which the Commission rejected in *Enterprise TE* on the basis that Dr. Schink's test focused on a hypothetical increase in the lowest delivered price of gasoline, rather than an increase in transportation rates.[358] The Presiding Judge also relied on Dr. Carr's statement that his model is identical to Dr. Schink's except for the fact that Dr. Carr "performed an additional calibration step which Dr. Schink did not include" to calibrate his predicted volumes with actual delivered volumes.[359] The Presiding Judge found that the added calibration step failed to cure the flaws identified in *Enterprise TE*.[360]

146. The Presiding Judge agreed with the Complainants and Trial Staff that Dr. Carr's model was also deficient in other ways. First, the Presiding Judge found that Dr. Carr's model "does not come close to accurately reflecting actual volumes, and therefore would be of little use in predicting future volumes based on a hypothetical rate increase."[361] Second, the Presiding Judge determined that Dr. Carr's model does not show whether Buckeye has market power, because "a company that already has market-based rates would not necessarily be able to profitably increase its rates by 15% above prevailing levels because it would have already done so, presuming that it is attempting to maximize its profits."[362] Third, the Presiding Judge found that Dr. Carr's model of a hypothetical

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[356] *Id.* P 230.

[357] *Id.* P 241 (citing Ex. GP-80 at 64 (citing Ex. BPL-37 at 31-32)).

[358] *Id.* (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 42).

[359] *Id.* (quoting Ex. BPL-37 at 30).

[360] *Id.*

[361] *Id.* PP 241-242.

[362] *Id.* P 243.

rate increase was less reliable than actual knowledge from Buckeye's employees involved in setting Buckeye's market-based rates.[363]

b. Brief on Exceptions

147. On exceptions, Buckeye argues that the Presiding Judge improperly rejected Dr. Carr's linear attraction model.[364] Buckeye claims that Dr. Carr's analysis is far more robust in detail and was designed specifically to address the flaws identified with the earlier model presented in *Enterprise TE*. In particular, Buckeye claims that, contrary to the Presiding Judge's finding, Dr. Carr's model does focus on an increase in transportation rates because delivered prices used in the model are adjusted by adding an assumed delivered price increase that would result from an increase in transportation rates (specifically, an assumed Buckeye tariff rate increase).[365] In addition, Buckeye argues that the 1.3 percent competitive range used by Dr. Carr is not a hypothetical increase in the lowest delivered price of gasoline, as the Presiding Judge finds, but rather "an empirically derived estimate of the degree of price dispersion for wholesale gasoline sales in the Harrisburg destination market, (i.e., it is an allowance for non-price factors)."[366]

148. In response to the Presiding Judge's finding that the model does not accurately reflect actual volumes, Buckeye claims that the Presiding Judge relies on incorrect figures for volumes generated by Dr. Carr's model. In particular, the Presiding Judge's figure for Dr. Carr's estimate for Buckeye's Harrisburg deliveries is actually Dr. Carr's estimate of Buckeye's 2012 deliveries into Harrisburg after eliminating Dr. Carr's procedure to calibrate his predicted volumes with actual volumes.[367] Buckeye states that the Presiding Judge's figure for Sunoco's 2012 deliveries to Harrisburg is also incorrect as Dr. Carr actually set those deliveries equal to zero to recognize that Sunoco no longer makes pipeline deliveries to Harrisburg.[368] Buckeye further argues that the Presiding

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[363] *Id.* P 244.

[364] Buckeye Brief on Exceptions at 81-87.

[365] *Id.* at 83 (citing Ex. BPL-37 at 31-32).

[366] *Id.* at 84.

[367] *Id.*

[368] *Id.* at 85.

Judge inappropriately compares Dr. Carr's estimates, which are based on 2012 data, to Buckeye's actual 2014 delivery volumes.[369]

149. Buckeye claims that the Presiding Judge inappropriately assumes that because Buckeye has market-based rates it will be able to increase its rates to profit-maximizing levels for the same reasons previously discussed.[370]

150. Buckeye asserts that, contrary to the Presiding Judge's finding, Dr. Carr's model reflects actual knowledge from Buckeye's employees involved in rate setting, as Dr. Carr interviewed Mr. David Arnold, President of domestic pipelines for Buckeye, regarding Buckeye's rate-setting methodology.[371]

c. Briefs Opposing Exceptions

151. The Complainants and Trial Staff respond that the Presiding Judge correctly decided not to afford Dr. Carr's linear attraction model any weight and support the Presiding Judge's rationales discussed above for rejecting the model.[372] The Complainants argue that Dr. Carr's model is flawed and results in inaccurate predicted volumes as compared to evidence of actual market activity in the Harrisburg destination market.[373]

152. In addition, the Complainants argue that Dr. Arthur demonstrated that Buckeye could increase its rates to Harrisburg without losing volumes. Because Buckeye's system from Chelsea Junction to the Pittsburgh and Harrisburg markets has been operating at capacity since mid-2014, there is excess demand at Buckeye's existing rates, and Buckeye could therefore increase its tariff rates by some amount without losing any volumes, contrary to the predictions of Dr. Carr's model.[374] The Complainants also argue that Dr. Carr's 1.3 percent competitive range is not supported by the Federal Trade

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[369] *Id.*

[370] *Id.* at 86.

[371] *Id.* (citing Tr. at 1466-1467).

[372] Trial Staff Brief Opposing Exceptions at 74-79; Complainants Brief Opposing Exceptions at 38-44.

[373] Complainants Brief Opposing Exceptions at 49-54.

[374] *Id.* at 41, 53-54 (citing Ex. GP-84).

Commission study on branded price dispersion and analyses of the interquartile range of unbranded price dispersion on which he purports to rely.[375]

153. The Complainants assert that the range of delivered prices that Dr. Carr and Dr. Schink consider competitive spans 4 cents per gallon, however a typical gasoline retailer's profit margin is only 3 to 5 cents per gallon.[376] The Complainants argue that given this fact, it is unrealistic to assume that a retail station would be willing to eliminate its entire profit margin by obtaining a homogeneous commodity at 4 cents per gallon higher than that available from other alternatives.[377]

154. Trial Staff argues that Dr. Carr's credibility is undermined by misleading testimony to support Dr. Schink's 1 to 2 percent competitive range, in which Dr. Carr expanded the 1 to 2 percent range by an additional 0.5 percent.[378]

d. Commission Determination

155. The Commission affirms the Presiding Judge. Dr. Carr's linear attraction model suffers the same flaw as Dr. Schink's delivered price test in that it fails to analyze an increase in transportation rates.[379] The Presiding Judge also correctly identifies numerous deficiencies in Dr. Carr's model that further support its rejection by the Presiding Judge. The model fails to accurately account for actual delivery numbers, and its predicted volumes do not come close to matching actual volumes.[380] Finally, the Commission affirms the Presiding Judge's determinations concerning the persuasiveness of testimony (or lack of testimony) presented by employees of Buckeye in support of Dr. Carr's model.[381]

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[375] *Id.* at 41-42.

[376] *Id.* at 43 (citing Ex. GP-80 at 60; Ex. GP-88 at 21).

[377] *Id.* at 43-44.

[378] Trial Staff Brief Opposing Exceptions at 78-79 (citing Ex. BPL-37 at 25, Figure 1; Tr. 1517).

[379] Initial Decision, 155 FERC ¶ 63,008 at P 241.

[380] *Id.* P 242.

[381] *Id.* P 244.

6. Dr. Webb's Historical Tariff Analysis

a. Initial Decision

156. Buckeye introduced testimony of Dr. Webb to show that Buckeye's rates are not at or above competitive levels because Buckeye's historical rate increases in the Harrisburg and Pittsburgh destination markets are similar to other market-based rate increases in Buckeye's other markets and lower than rate increases of other pipelines with market-based rate authority. The Presiding Judge agreed with the Complainants and Trial Staff that Dr. Webb's analysis should be given no weight.

157. The Presiding Judge determined that the underlying database relied upon by Dr. Webb is "fraught with errors and is therefore unreliable under the standards set forth under Federal Rule of Evidence 702 and Rule 509 of the Commission's Rules of Practice and Procedure."[382] The Presiding Judge observed that Dr. Webb's testimony compares Buckeye's rate increases to nine other pipelines with market-based rate authority, including Colonial, Enterprise, Explorer, Magellan, Marathon, NuStar, Sunoco, West Shore, and Wolverine.[383] The Presiding Judge relied on Trial Staff's cross-examination of Dr. Webb, which highlighted various errors in the underlying database, to conclude that the data Dr. Webb used in his analysis was unreliable.[384] In particular, Dr. Webb conceded that the data for four of the nine oil pipelines (Colonial, West Shore, Wolverine, and Magellan) contained several discrepancies with the pipelines' actual tariff rates and that tariffs were missing from the database.[385] The Presiding Judge rejected Buckeye's argument that the errors in the database were random and inconsequential, and instead found they were "errors of omission of relevant tariffs and misidentification of origin-destination pairs."[386] The Presiding Judge reasoned that while "a certain degree of error is expected" Dr. Webb failed to make even "a cursory check of the data" that could have allowed the errors to be accounted for or corrected.[387] The Presiding Judge concluded that "[c]onsidering the large number of errors in rates, omission of numerous tariffs, and misidentification of base versus incentive rates in the small sample of exhibits

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[382] *Id.* P 261.

[383] *Id.* P 258; *see also* Ex. BPL-89, Ex. BPL-95, Ex. BPL-97, and Ex. BPL-98.

[384] Initial Decision, 155 FERC ¶ 63,008 at P 261.

[385] *Id.* PP 250-255, 261; Tr. 1240-1298.

[386] Initial Decision, 155 FERC ¶ 63,008 at P 258.

[387] *Id.* P 261.

that Trial Staff cross-examined Dr. Webb on during the hearing, the reliability of the database is certainly called into question" and thus, found Dr. Webb's testimony should be afforded no weight.[388]

b. Brief on Exceptions

158. On exceptions, Buckeye argues that even though it does not have the burden to prove its rates were not at supra-competitive levels, Dr. Webb provided proof that Buckeye's Harrisburg rates increased at levels comparable to increases in Buckeye's competitive markets and increases by other pipelines with market-based rates.[389] Buckeye claims that the Presiding Judge's rejection of Dr. Webb's analysis is unsupported.[390]

159. Buckeye argues that the Presiding Judge failed to address Dr. Webb's comparison provided in his rebuttal testimony of Buckeye's rates in the Harrisburg market to the Pittsburgh market, including 2005 when Buckeye acquired Mobil pipeline. Buckeye asserts that the Presiding Judge correctly found that Buckeye lacks market power in the Pittsburgh destination market.[391] According to Dr. Webb, "[t]o the extent Buckeye were able to exercise market power in Harrisburg after 2005, one would expect to see a significant increase in Harrisburg rates relative to Pittsburgh rates."[392] Buckeye explains that Dr. Webb provided an actual comparison of rate changes in Harrisburg and Pittsburgh that showed a difference in rate changes of less than 4 percent after 23 years.[393] Buckeye argues that this close correlation shows that the Harrisburg rates continue to be constrained by competition.[394] Further, Buckeye asserts that this analysis was not based on the database challenged by Trial Staff and dismissed by the Presiding Judge, but instead on Annual Reports filed by Buckeye to report its rates and volumes.[395]

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[388] *Id.*

[389] Buckeye Brief on Exceptions at 30.

[390] *Id.* at 35-39.

[391] *Id.* at 34.

[392] *Id.* at 32 (quoting Ex. BPL-89 at 8-9).

[393] *Id.* at 33 (citing Ex. BPL-89 at 13, Figure 2).

[394] *Id.* at 34.

[395] *Id.* at 33-34.

Buckeye argues that this data was unchallenged and was relied on by all parties and the Presiding Judge.[396]

160. Buckeye claims that the Presiding Judge ignored Dr. Webb's comparison of Buckeye's Harrisburg rate increases to increases in other markets where Buckeye has market-based rate authority.[397] Buckeye further addresses the Complainants' criticism that Dr. Webb did not compare the rates to measures of cost, claiming that *Seaway II* rejected the argument that the competitive price must equal cost.[398]

161. In addition, Buckeye argues that in rejecting Dr. Webb's analysis, the Presiding Judge misconstrues the standard for judging the accuracy of large databases and fails to correctly analyze the data, but instead relies on invalid statistical analyses proffered by Trial Staff.[399] Buckeye claims that the Presiding Judge ignored the fact that Dr. Webb corrected one error in the database related to the miscoding of an incentive rate as a base rate, which Dr. Webb found to be systematic.[400] Buckeye argues that the Presiding Judge incorrectly states that a cursory check of the data could have revealed errors, as Trial Staff analyzed the database for two and a half months and identified approximately 20 errors in a database containing 120,000 records – "a trivial number of errors," according to Buckeye.[401] Buckeye also argues that the Presiding Judge mistakenly characterizes "the hand-picked minor errors identified by Trial Staff" as a "sample," when it was not a random sample from which conclusions can be drawn about the universe of data.[402] Buckeye contends that Trial Staff did not provide any witness testimony regarding sampling and "there is no evidence in the record that Trial Staff conducted a sample analysis," but rather "the only evidence suggests that the identified errors represent a tiny scattering of errors discovered after lengthy research."[403] Buckeye

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[396] *Id.* (citing Initial Decision, 155 FERC ¶ 63,008 at P 166, n.252 (citing Ex. GP-80 at 32) and P 214).

[397] *Id.* at 31.

[398] *Id.* at 34 (citing Ex. GP-80 at 41-42).

[399] *Id.* at 30-31, 35-39.

[400] *Id.* at 35.

[401] *Id.* at 35-36.

[402] *Id.* at 36-37 (citing Initial Decision at P 261).

[403] *Id.* at 37.

further argues that there is no evidence that the errors impacted Dr. Webb's conclusions and that Dr. Webb testified that the errors appeared to be random and to cancel each other out.[404] Buckeye claims that the Presiding Judge provided no explanation for finding that the errors are not random errors or that they undermine Dr. Webb's conclusions.[405] Buckeye asserts that the only question is whether the Presiding Judge has correctly analyzed the data and this is not a case in which the Presiding Judge should be given deference because of the demeanor and/or credibility of the witness.[406] Finally, Buckeye asserts that the Presiding Judge fails to acknowledge that Trial Staff did not identify a single error related to five of the nine pipelines in Dr. Webb's analysis.[407]

c. Briefs Opposing Exceptions

162. The Complainants and Trial Staff respond that the Presiding Judge correctly found that Dr. Webb's analysis contained significant errors and declined to afford any weight to Dr. Web's analysis.[408] In particular, Trial Staff asserts that the cross examination of Dr. Webb reveals far more than 20 errors, and Buckeye incorrectly represents that Trial Staff's review of the database was extensive and complete.[409] Trial Staff also argues that the errors are of the type that would impact Dr. Webb's analysis.[410]

163. Regarding Dr. Webb's rebuttal analysis, the Complainants and Trial Staff argue that there is no basis to assume that a competitive rate level for Buckeye's transportation service must increase at the percentages of other pipelines in other markets or how rate increases in other markets are relevant.[411] In addition, the Complainants argue that Dr. Webb's comparison does not show that Buckeye's rates to Harrisburg are at

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[404] *Id.* (citing Tr. 1297-1298).

[405] *Id.* at 38.

[406] *Id.* at 31.

[407] *Id.* at 39.

[408] Complainants Brief Opposing Exceptions at 34-37; Trial Staff Brief Opposing Exceptions at 55-73.

[409] Trial Staff Brief Opposing Exceptions at 65-66.

[410] *Id.* at 68-69.

[411] Complainants Brief on Exceptions at 36-37; Trial Staff Brief on Exceptions at 71.

competitive levels because Dr. Webb fails to identify any base level of competitive rates for Buckeye's transportation service.[412] The Complainants argue that Dr. Webb relies on the erroneous assumption that Buckeye lacks market power in Pittsburgh.[413]

d. Commission Determination

164. The Commission agrees with the Presiding Judge's finding that Dr. Webb's testimony should be afforded no weight to the extent it relies on an underlying database for which Trial Staff identified numerous errors during the cross-examination of Dr. Webb at hearing. The Commission affords deference to the Presiding Judge as the trier of fact regarding the weight to be afforded to testimony and evidence.[414] There is no reason to overturn the Presiding Judge's determination here. It is undisputed that during the cross-examination of Dr. Webb, Trial Staff identified numerous errors in the data for four of the nine pipelines in Dr. Webb's analysis.[415] These errors included omission of relevant tariffs and misidentification of origin-destination pairs,[416] and were sufficient to support the Presiding Judge's finding that the reliability of the database Dr. Webb used in his analysis was called into question. Buckeye's assertions, such as that Dr. Webb corrected a systematic error in the database related to the miscoding of an incentive rate as a base rate and that Trial Staff did not identify errors regarding five of the nine pipelines, do not demonstrate that the Presiding Judge's determination as to the appropriate weight to afford Dr. Webb's testimony is in error. Nor was the Presiding Judge required to conduct a statistical analysis or otherwise measure the impact of the errors on Dr. Webb's conclusions with mathematical precision. We find that in light of

[412] Complainants Brief on Exceptions at 35-36.

[413] *Id.* at 36.

[414] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact."); *El Paso Natural Gas Co.*, 67 FERC ¶ 61,327, at 62,156 (1994) ("In matters where a decision had to be made as to the relative weight to be accorded the testimony of a witness, we will give great deference to the decision of the ALJ"); *Entergy Services, Inc.*, 130 FERC ¶ 61,023, at P 53 n.66 (2010) ("We note that the Presiding Judge is entitled to deference with regard to the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence.").

[415] *See* Tr. 1242-1298; Buckeye Brief on Exceptions at 35-36; Initial Decision at PP 250-256.

[416] Initial Decision, 155 FERC ¶ 63,008 at PP 258, 261; Tr. at 1248-1297.

the numerous errors identified by Trial Staff, the conclusion of the Presiding Judge, as the trier of fact, is supported by the record.[417]

165. Dr. Webb's comparisons of Buckeye's Harrisburg rate changes to Buckeye's Pittsburgh and Buckeye's other market-based rate changes did not rely on the problematic database.[418] The Presiding Judge does not appear to have made any determinations regarding the weight to be afforded to this portion of Dr. Webb's testimony. The Commission finds that Dr. Webb's testimony comparing Buckeye's Harrisburg rate changes to Buckeye's rate changes in Pittsburgh and other competitive markets does not demonstrate that Buckeye has not exercised market power in the Harrisburg market. The sole basis for Dr. Webb's comparison is the following statement:

> To the extent Buckeye were able to exercise market power in Harrisburg after 2005, one would expect to see a significant increase in Harrisburg rates relative to Pittsburgh rates. By contrast, if rates in Harrisburg have not differed significantly from the competitive market in Pittsburgh, particularly after 2005, it is reasonable to conclude that Buckeye has not exercised market power . . . .[419]

166. Assuming that the Pittsburgh destination market is competitive for purposes of this discussion, neither Buckeye nor Dr. Webb provide any support for the proposition that if Buckeye were able to exercise market power Buckeye would have increased its Harrisburg rates relative to the Pittsburgh rates. Buckeye fails to provide any rationale for assuming that the rate changes in the two markets are comparable and the rate changes should always exhibit a correlation absent the presence of market power such that Pittsburgh is an effective control as Dr. Webb claims.[420] Nor did Dr. Webb explain his assumption that if Buckeye could exercise market power in the Harrisburg market, it

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[417] Tr. 1242-1298.

[418] *See* Ex. BPL-89 at 12-13, Ex. BPL-94. The database containing the errors identified by Trial Staff was used to prepare BPL-95, BPL-97 and BPL-98, which compare Buckeye's Harrisburg and Pittsburgh rate changes to the rate changes of other pipelines with market-based rate authority. *See* Initial Decision, 155 FERC ¶ 63,008 at PP 258, 260; Tr. 1224.

[419] Ex. BPL-89 at 8-9; *see also* Buckeye Brief on Exceptions at 32. Dr. Webb's analysis refers to 2005 as a critical point because Buckeye acquired Mobil pipeline in that year, which resulted in a reduction in the number of competitors in the Harrisburg market. Ex. BPL-89 at 8.

[420] *See* Ex. BPL-89 at 7, 12-13.

would necessarily increase rates at a greater pace relative to the allegedly competitive Pittsburgh rate increases. Dr. Webb does not explain his further logical leap that an absence of a substantial deviation between the Harrisburg and Pittsburgh annual rate change indices "strongly suggests that Buckeye has not exercised market power."[421]

167. Dr. Webb also provides a hypothetical illustration of how Buckeye would supposedly set its rates if it had exercised market power after 2005 in the Harrisburg destination market but not in the Pittsburgh destination market.[422] The chart shows the Harrisburg and Pittsburgh rates rising in tandem before 2005, and then diverging significantly, with the Harrisburg rates increasing by greater percentages per year compared to Pittsburgh.[423] The chart is no more than a visual representation of Dr. Webb's unsubstantiated speculation that "[t]o the extent Buckeye were able to exercise market power in Harrisburg after 2005, one would expect to see a significant increase in Harrisburg rates relative to Pittsburgh rates."[424] As described above, Dr. Webb provides no support for this proposition. The illustrative chart is not based on actual data.[425] Dr. Webb provides no empirical data, study or analysis of how entities exercising market power raise prices at greater increments relative to entities in competitive markets, nor of how the absence of such deviation provides a reliable indicator that an entity has not exercised market power.

168. Thus, Dr. Webb's comparison showing that Buckeye's Harrisburg rates did not increase significantly relative to Buckeye's Pittsburgh rates after 2005 fails to demonstrate that Buckeye has not exercised market power in the Harrisburg market, much less that Buckeye does not possess market power in the Harrisburg market. Dr. Webb's comparisons of Buckeye's Harrisburg and Pittsburgh rate changes to other markets where Buckeye has market-based ratemaking authority and to the rate changes of other pipelines with market-based rate authority reflect the same unfounded logic.[426] Dr. Webb does not provide any discussion of the characteristics of the markets used in the comparisons aside from the fact that they were found to be competitive in market-

[421] Buckeye Brief on Exceptions at 31; Ex. BPL-89 at 3; *see also id.* at 12-13.

[422] Buckeye Brief on Exceptions at 32, Figure 1; Ex. BPL-89 at 10-11.

[423] Ex. BPL-89 at 10-12.

[424] Ex. BPL-89 at 8-9.

[425] *Id.* at 10.

[426] *See* Ex. BPL-89 at 9, 13-15; Ex. BPL-94, Ex. BPL-95, Ex. BPL-96, Ex. BPL-97, Ex. BPL-98; *see also* Tr. 1307-1308.

based rate proceedings.[427] Dr. Webb does not make any attempt to describe why or how the rate changes in different markets would be expected to correlate with Buckeye's rate changes, and provides no justification for assuming that because Buckeye's Harrisburg/Pittsburgh rates have not increased at a faster pace than other market-based rates in different markets, Buckeye has not exercised market power.[428] Therefore, the Commission rejects Dr. Webb's analysis insofar as it purports to show that Buckeye has not exercised market power.

7. The Relevant Product Market

a. Initial Decision

169. The Presiding Judge found, and no party disputes, that the definition of the product market is the transportation of all pipelineable refined petroleum products.[429] However, the Presiding Judge rejected Buckeye's argument that Dr. Arthur improperly used a narrower product market definition regarding the origin market because Dr. Arthur excluded volumes under an intrastate tariff. The Presiding Judge agreed with the Complainants and Trial Staff that the exclusion of intrastate volumes relates to the definition of geographic market for the origin market, not the product market.[430]

b. Brief on Exceptions

170. On exceptions, Buckeye argues that the Presiding Judge erred in accepting Dr. Arthur's limited product market for the Chelsea Junction origin.[431] Buckeye asserts that Dr. Arthur only assessed the volumes and alternatives available to the shippers of refined petroleum products that ship under Buckeye's interstate tariff and excluded any volumes and transportation options that did not involve Buckeye's interstate tariff movements, thereby ignoring all volumes leaving Chelsea Junction under an intrastate

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[427] *See* Ex. BPL-89 at 7, 9, 13-16; *see also* Tr. 1213-1214, 1215-1216, 1220-1222, 1231.

[428] This provides an independent basis for rejecting Dr. Webb's historical tariff analysis as an indicator that Buckeye has not exercised market power in its entirety, even if the underlying database used for the comparisons to other pipelines' market-based rate changes were reliable.

[429] Initial Decision, 155 FERC ¶ 63,008 at P 263.

[430] *Id.*

[431] Buckeye Brief on Exceptions at 78-80.

tariff.[432] Buckeye claims Dr. Arthur's failure to include those intrastate volumes in defining his origin market and assessing the alternatives available is not an issue of geographic market definition and materially undercuts Dr. Arthur's conclusions as to the origin market.

171. As an example, Buckeye contends that Dr. Arthur excludes all volumes from Monroe Energy's Trainer Refinery that did not use the FERC rate on Buckeye, even if those volumes entered the pipeline system, but Dr. Arthur nonetheless uses the entire capacity of the Laurel/Buckeye pipeline system, including the portion used for intrastate volumes, in his determination of relevant adjusted capacity.[433] Accordingly, Buckeye claims Dr. Arthur includes the entire capacity of the pipeline, yet excludes a large portion of the volumes entering the pipeline, as well as the options available to shippers of those excluded volumes. Buckeye claims that these adjustments bias upward the results of Dr. Arthur's Herfindahl-Hirschman Index (HHI) calculations for the origin and destination markets, and are inconsistent with the Commission's analysis of product market definitions.[434] Buckeye argues that Dr. Arthur incorrectly characterizes his approach as consistent with *SFPP* and *Seaway*,[435] but the Commission does not make such a limitation on the product market definition in those decisions.[436]

c. Briefs Opposing Exceptions

172. The Complainants and Trial Staff argue that the Presiding Judge correctly found that Buckeye conflates the relevant product market with the geographic market and rejected Buckeye's claim that the product market for Chelsea Junction should include intrastate volumes transported on Laurel.[437] Trial Staff claims that the Presiding Judge's

[432] *Id.* at 78 (citing Tr. 565).

[433] *Id.* at 79 (citing Tr. 576-582).

[434] *Id.*

[435] *Id.* at 80 (citing Tr. 586; *SFPP, L.P.*, 84 FERC ¶ 61,338 (1998); *Seaway I*, 146 FERC ¶ 61,115).

[436] *Id.* at 79.

[437] Complainants Brief Opposing Exceptions at 69-71; Trial Staff Brief Opposing Exceptions at 83-85.

findings regarding capacities and the HHI in the origin market demonstrate that the product market definition was not limited to interstate transportation.[438]

173. The Complainants assert that Dr. Arthur properly excluded volumes originating at the Monroe Refinery from the geographic market because those products are not charged interstate rates and intrastate volumes would be unaffected if Buckeye were to attempt to exercise market power by increasing its interstate rates. The Complainants also argue that, contrary to Buckeye's claim, Dr. Arthur did not include all of Buckeye and Laurel's capacity in his market share and market concentration calculations while also omitting intrastate Laurel volumes originating at Chelsea Junction and the options available to those shippers. The Complainants assert that Dr. Arthur followed the Commission's effective-capacity methodology in his HHI analysis to eliminate the capacity serving the intrastate volumes from Buckeye's effective capacity-based market share calculation.[439]

d. Commission Determination

174. The Commission accepts the product market definition of all pipelineable refined petroleum products,[440] but reverses the Presiding Judge's finding that the exclusion of intrastate transportation is a "geographic market" issue.[441] All parties agree with the Presiding Judge's definition of the product market as the transportation of all pipelineable refined petroleum products.[442] Buckeye argues that Dr. Arthur only assessed the volumes and alternatives available to the shippers of refined petroleum products that use Buckeye's interstate tariff, excluding any intrastate volumes.[443] The Presiding Judge determined that Dr. Arthur's exclusion of intrastate volumes relates to the definition of geographic market, not the product market.

175. The exclusion of all intrastate volumes is an issue of either the proper definition of the product market, or the identification of good alternatives. It is not, contrary to the holding of the Presiding Judge, a geographic market issue. The Commission stated in *Seaway I*, "[t]he appropriate product market in a market-power analysis includes

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[438] Trial Staff Brief Opposing Exceptions at 84-85.

[439] Complainants Brief Opposing Exceptions at 70 (citing Tr. 573-588).

[440] Initial Decision, 155 FERC ¶ 63,008 at P 263.

[441] *Id.* P 264.

[442] *See id.* P 263.

[443] Buckeye Brief on Exceptions at 78.

(1) those services for which the applicant seeks to charge market-based rates, and (2) any product that could discipline the exercise of market power over those products."[444] Distinctions between intrastate and interstate volumes are not a relevant basis for delineating separate product markets in the market power analysis if intrastate service could discipline an exercise of market power in interstate service.[445] Further, whether to include a particular facility offering intrastate service depends on whether that provider is a good competitive alternative to Buckeye in the relevant market. Ultimately, the Presiding Judge was correct in defining the product market as the transportation of all pipelineable refined petroleum products.[446]

8. The Relevant Geographic Markets

a. The Origin Market

i. Initial Decision

176. The Presiding Judge described the view of the Complainants and Trial Staff that the relevant geographic market for the origin market should be the volumes originating at PBF's Delaware City Refinery that are assessed Buckeye's interstate tariff rates at Chelsea Junction, and Buckeye's position that the broader Philadelphia BEA economic area should be used. The Complainants and Trial Staff argued that the relevant geographic market is defined from the viewpoint of the customers/shippers of refined products at the Chelsea Junction origin served by Buckeye and how those shippers would react to an increase in the transportation rate on Buckeye's system. They asserted that only volumes originating at PBF's Delaware City Refinery that are assessed Buckeye's interstate tariff rates at Chelsea Junction should be considered.[447] Buckeye claimed that the origin market should be defined as the broader Philadelphia BEA because all of the refineries in the Philadelphia BEA can supply all consumption via exchanges, even though they are not physically connected to PBF's Delaware City Refinery.[448] Buckeye

[444] *Seaway I*, 146 FERC ¶ 61,115, at P 44 (2014).

[445] *See ANR Storage Co.*, 153 FERC ¶ 61,052, at PP 107-108 (2015).

[446] Initial Decision, 155 FERC ¶ 63,008 at P 264.

[447] *Id.* P 267.

[448] *Id.* PP 269-270; *see also id.* P 433.

argued that the Commission accepted the Philadelphia BEA as the geographic definition of the origin market in *Sunoco Pipeline, L.P.* and *Colonial Pipeline Company*.[449]

177. The Presiding Judge agreed with the position of the Complainants and Trial Staff, finding that "the geographic origin market is limited to the volumes originating at PBF's Delaware City Refinery that are assessed [Buckeye's] interstate tariff rates at Chelsea Junction."[450]

178. As to the Commission's standard for defining an origin market, the Presiding Judge agreed with the Complainants and Trial Staff that "the relevant geographic origin market is defined from the viewpoint of the customer/shipper of refined products at the origin served by [Buckeye]."[451] The Presiding Judge stated: "As the Commission discussed in *SFPP*, the test for determining origin markets is 'that area which includes all means by which refiners whose products currently move through [the subject pipeline's origin point at issue] can dispose of their production elsewhere.' In other words, the origin market includes the subject pipeline's customers, and the alternatives that the customers could profitably use to avoid the exercise of market power by the subject pipeline."[452] The Presiding Judge also found that the Hearing Order supported her decision regarding the definition of the origin market in part because the Commission described the issue as whether Buckeye has market power in Chelsea Junction.[453]

179. The Presiding Judge found that the only refineries connected to Buckeye's system at the Chelsea Junction receipt point are PBF's Delaware City Refinery and Monroe Energy's Trainer Refinery. However, the Presiding Judge determined that the Monroe Refinery was not a source for interstate movements on Buckeye's system because the refinery is located in Pennsylvania and shipments originating from the refinery are subject to Laurel's intrastate rates. Therefore, the Presiding Judge found that shipments originating from the Monroe Refinery are not subject to a potential exercise of market power by Buckeye.[454] The Presiding Judge concluded that the origin market should be

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[449] *Id.* PP 269-270 (citing *Sunoco Pipeline, L.P.*, 118 FERC ¶ 61,266 (2007); *Colonial Pipeline Co.*, 95 FERC ¶ 61,377 (2001)).

[450] *Id.* P 273.

[451] *Id.* P 271.

[452] *Id.* (quoting *SFPP*, 84 FERC ¶ 61,338 at 62,496).

[453] *Id.* P 272 (citing Hearing Order, 147 FERC ¶ 61,088 at PP 38, 44).

[454] *Id.* P 273 (citing Ex. S-5 at 61-62).

focused on the alternatives for moving product from PBF's Delaware City Refinery and not the Philadelphia BEA because "PBF's Delaware City Refinery is effectively the sole source for interstate movements on Respondent's system from its Chelsea Junction receipt point and is the only shipper subject to a potential exercise of market power by Respondent at Chelsea Junction."[455]

180. The Presiding Judge distinguished *Sunoco* and *Colonial* on the basis that those proceedings involved multiple origin points and were both uncontested, noting that the geographic market is determined on a fact-specific, case-by-case basis.[456] The Presiding Judge also dismissed Buckeye's argument that the origin market should be defined as the Philadelphia BEA because all of the refineries in the Philadelphia BEA can supply all consumption via exchanges, finding that "the use of exchanges does not necessarily create new alternatives to transport the product to market" and if exchanges were included "there would be no logical stopping point to the boundary of the market."[457]

ii. Brief on Exceptions

181. On exceptions, Buckeye argues that the appropriate origin market definition is the Philadelphia BEA.[458] Buckeye asserts that evidence showed that PBF could access alternatives in the BEA not physically connected to the Delaware City Refinery via exchanges and that defining the origin market as the Philadelphia BEA is consistent with Commission precedent.[459] Buckeye argues that the Presiding Judge accepted an overly narrow definition of the origin market that includes only alternatives physically

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[455] *Id.*

[456] *Id.* P 274 (citing *Seaway I,* 146 FERC ¶ 61,115 at P 39).

[457] *Id.* P 275 (citing *SFPP,* 84 FERC ¶ 61,338 at 62,496 and n.15).

[458] Buckeye Brief on Exceptions at 75-77.

[459] *Id.* (citing *Williams Pipe Line Co.*, 71 FERC ¶ 61,291, at 62,129 (1995); *Kaneb Pipe Line Operating P'ship, L.P.*, 83 FERC ¶ 61,183, at 61,760-761 (1998); *Longhorn Partners Pipeline, L.P.*, 83 FERC 61,345, at 62,378, at 62,381 (1998); *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at 62,385-62,386 (1999), *TE Products Pipeline Co.*, 92 FERC ¶ 61,121, at 61,464 (2000); *Colonial Pipeline Co.*, 92 FERC ¶ 61,144 at 61,529, at 61,532 (2000); *Wolverine Pipe Line Co.*, 92 FERC ¶ 61,277, at 61,921 - 61,923 (2000); *Chevron Pipe Line Co.*, 95 FERC ¶ 61,111 (2001); *West Shore Pipe Line Co.*, 100 FERC ¶ 61,001, at P 6 (2002); *Sunoco Pipeline, L.P.*, 114 FERC ¶ 61,036, at P 43 (2006); *Magellan Pipeline Co., L.P.*, 128 FERC ¶ 61,278, at PP 2,5 (2009); *Magellan Pipeline Co., L.P.*, 132 FERC ¶ 61,016, at P 5 (2010)).

connected to PBF's refinery, and thereby excludes Colonial pipeline, waterborne movements out of Philadelphia over docks not directly connected to PBF's Delaware City refinery, and sales over local truck racks not made by PBF from its Delaware City refinery.[460]

[460] *Id.* at 76.

iii. Briefs Opposing Exceptions

182. The Complainants respond that the Presiding Judge correctly defined the relevant origin market and rejected Buckeye's broader origin market definition.[461]

iv. Commission Determination

183. The relevant geographic market is that area in which a shipper may rationally look for transportation service. The Commission does not require any specific methodology for defining geographic markets, and analyzes each proceeding on a case-by-case basis.[462] Under the Hypothetical Monopolist Test, as employed by the Complainants, if a hypothetical monopolist could impose a SSNIP in the proposed market, the market is properly defined. If, however, shippers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow. Importantly, a market's geographic scope must correspond to the commercial realities of the industry.[463]

184. The Presiding Judge correctly found that PBF's Delaware City refinery is effectively the sole source for interstate movements on Buckeye's system from the Chelsea Junction receipt point and is therefore the only shipper subject to a potential exercise of market power by Buckeye at Chelsea Junction.[464] The origin market must therefore be defined in this proceeding by examining where the PBF refinery could acquire transportation service in response to a SSNIP. The Commission affirms that the origin market is in fact the only receipt point on Buckeye with a pipeline connection to the PBF Delaware City Refinery, Chelsea Junction.[465]

185. The Commission affirms the Presiding Judge's rejection of the use of exchanges when defining the appropriate origin market.[466] An exchange, as defined by the Presiding Judge, is the combination of two different wholesale transactions, such as buying and

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[461] Complainants Brief Opposing Exceptions at 67-69; Trial Staff Brief Opposing Exceptions at 85-87.

[462] *Seaway I*, 146 FERC ¶ 61,115 at P 39.

[463] *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-337 (1962).

[464] Initial Decision, 155 FERC ¶ 63,008 at P 273.

[465] *Id*.

[466] *Id.* P 275.

selling product at two locations, where the price of the product at each location reflects the competitive conditions at each location.[467] Exchanges do not limit a pipeline's ability to exercise market power in the origin market.[468] The Commission gives little if any weight to exchanges when conducting a market power analysis. The potential for double counting capacity where an alternative's capacity is directly included in the HHI calculation and then again included as part of an exchange is too great.[469]

186. Although correctly defining the origin market, the Presiding Judge misconstrued the language of the Hearing Order referring to Chelsea Junction when doing so.[470] Chelsea Junction is the origin point for product entering Buckeye's system.[471] Any potential exercise of market power by Buckeye would occur at the Chelsea Junction origin point. However, by referring to the Chelsea Junction origin point in the Hearing Order, the Commission was not making an affirmative finding that Chelsea Junction was the appropriate origin market for a market power analysis of Buckeye. Just as the reference to Harrisburg in the Hearing Order did not limit the geographic destination market to the Harrisburg city limits, for example, the reference to Chelsea Junction did not limit the boundaries of the appropriate origin market.

b. The Destination Markets

i. Initial Decision

187. The Presiding Judge adopted Dr. Arthur's definitions of the Pittsburgh and Harrisburg geographic markets as revised in his rebuttal testimony.[472] Regarding Pittsburgh, Dr. Arthur's direct testimony adopted the "Modified Pittsburgh BEA" proposed by Dr. Schink in his November 4, 2013 affidavit. Dr. Arthur revised his proposal in his rebuttal testimony to include seven counties that were not included in the Modified Pittsburgh BEA, and exclude six counties that were included in the Modified

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[467] *Id.* P 449.

[468] *See SFPP, L.P.*, 84 FERC ¶ 61,338, at 62,496-62,497 (1998).

[469] *Williams Pipe Line Co.*, Opinion No. 391, 68 FERC ¶ 61,136, at 61,673 (1994) (*Williams*).

[470] Initial Decision, 155 FERC ¶ 63,008 at P 272.

[471] Hearing Order, 147 FERC ¶ 61,088 at P 38; *see also* Complaint at 5.

[472] Initial Decision, 155 FERC ¶ 63,008 at PP 285, 301; *see also id.* P 276 (citing Ex. GP-80 at 73-78, Figure 2).

Pittsburgh BEA (hereafter the "Revised Pittsburgh Definition").[473] Buckeye and Trial Staff argued that the Presiding Judge should adopt the Modified Pittsburgh BEA. Buckeye argued that Dr. Arthur's Revised Pittsburgh Definition is inconsistent with *Enterprise TE*, because the approach approved by the Commission in that decision included in the set of potential counties all counties within a 125-mile radius of the subject pipeline's delivery point and then eliminated counties where the subject pipeline was not cost-effectively competitive based on a delivered price test.[474]

188. The Presiding Judge adopted the Revised Pittsburgh Definition, relying on the conclusion that Dr. Arthur's delivered price test followed the Commission's preferred methodology.[475] The Presiding Judge rejected Buckeye's argument regarding *Enterprise TE*, finding that "the determination of a geographic market is a fact-specific inquiry and must be determined on a case-by-case basis."[476] The Presiding Judge also relied on testimony from Buckeye's expert witness, Dr. Schink, that a 125-mile radius may produce inappropriate results because of the "relatively dense population in the vicinity of Pittsburgh and Harrisburg."[477]

189. Regarding the Harrisburg destination market, the Presiding Judge explained that the Complainants proffered three different definitions of the Harrisburg market during the proceeding. First, Dr. Arthur's direct testimony adopted Dr. Schink's Modified Harrisburg BEA from his November 2013 affidavit, which did not include Berks County.[478] Second, in rebuttal Dr. Arthur revised his definition in response to some of Buckeye's and Trial Staff's criticisms, including removing Huntington County and

[473] *See id.* P 284.

[474] *Id.* PP 279-280 (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at PP 31, 40).

[475] *Id.* P 285.

[476] *Id.* P 287.

[477] *Id.* (quoting Ex. BPL-1 at 75, n.150).

[478] *Id.* P 291 (citing Ex. GP-2 at 43).

adding Berks and Franklin Counties.[479] Third, during the hearing, Dr. Arthur further revised his definition to remove Fulton, Franklin, and Adams counties due to the shutdown of the terminal served by Buckeye in Lancaster.[480] The Presiding Judge accepted Dr. Arthur's second definition of the Harrisburg geographic market from his rebuttal testimony, relying on the conclusion that Dr. Arthur's delivered price test followed the Commission's preferred methodology, and rejected Dr. Arthur's first and third definitions.[481]

190. The Complainants and Trial Staff supported including Berks County in the Harrisburg market definition, while Buckeye advocated excluding Berks County and adopting Dr. Arthur's original proposal from his direct testimony. The Presiding Judge found this issue significant, reasoning that "if the undersigned finds that [Buckeye] has market power in the Harrisburg destination market, Respondent would potentially no longer be able to charge market-based rates for deliveries to its Tuckerton and Sinking Spring destination points, both of which are located in Berks County."[482] The Presiding Judge noted that Dr. Arthur included Berks County based on the results of his analysis finding that Buckeye's terminal at Sinking Spring was within the lowest delivered price wholesale terminal cluster for several counties that he included in the relevant geographic market for Harrisburg.[483]

191. The Presiding Judge agreed with the Complainants and Trial Staff that Berks County should be included, finding "the [Buckeye] supplied terminals in Berks County are integral to determining the price of pipelineable refined petroleum products throughout most of Harrisburg."[484] The Presiding Judge found that "[a]ll experts agreed that the Sinking Spring terminals in Berks County are 'the cheapest alternative for a majority of counties in the Harrisburg destination market.'"[485] Relying on the testimony

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[479] *Id.* (citing Ex. GP-80 at 73-75); *see also id.* P 300, Figure 5 (diagram of the differences between Dr. Arthur's direct and rebuttal testimony definition of the Harrisburg geographic market).

[480] *Id.* PP 290-291.

[481] *Id.* P 301.

[482] *Id.* P 289.

[483] *Id.* P 290.

[484] *Id.* P 302.

[485] *Id.* (quoting Tr. 1792-93).

of Trial Staff witness, Mr. Siskind, the Presiding Judge explained that "the Sinking Spring terminals have the capacity to serve approximately half of all the consumption in the Harrisburg destination market,"[486] and "if a firm was attempting to exercise market power over its customers, it 'would need to have control over the cheapest way of supplying the market.'"[487] The Presiding Judge further explained:

> Evidence shows that virtually all of the gasoline and blend stock delivered to Sinking Spring terminals is conventional gasoline or blend stock for conventional gasoline. The source of the deliveries to Sinking Spring terminals is from the south in Philadelphia, or from the east, such as Linden, New Jersey. It is unlikely and counter-intuitive that the deliveries would be moved from Philadelphia to Sinking Spring, only to be trucked back down south to Philadelphia. Delivery data from Sinking Spring terminals show that the product delivered to those terminals is consumed in the Harrisburg destination market because conventional gasoline cannot be sold to the counties located to the south and east of Berks County.[488]

192. In addition, the Presiding Judge found that the Complaint does not limit relief regarding the destination markets and concluded that the Commission has discretion to terminate Buckeye's market-based rate authority if there is a showing that Buckeye can exercise market power in the Harrisburg destination market.[489]

ii. Briefs on Exceptions

193. Both Buckeye and the Complainants raise exceptions regarding the Presiding Judge's findings as to the relevant geographic market for the Harrisburg destination. Buckeye also challenges the Presiding Judge's determination regarding the Pittsburgh destination, but asserts that the Presiding Judge nonetheless correctly concluded that the Pittsburgh market was competitive.[490]

194. Buckeye argues that Dr. Arthur in his revised proposals for defining the Pittsburgh and Harrisburg destination markets, failed to follow the methodology endorsed by the

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[486] *Id.* (citing Tr. 1793).

[487] *Id.* (citing Tr. 1793).

[488] *Id.* P 303 (citing Tr. 1797-1798).

[489] *Id.* P 304.

[490] Buckeye Brief on Exceptions at 60.

Commission in *Enterprise TE*,[491] and as a result, the Presiding Judge's holding that Buckeye has market power in the Harrisburg destination market rests on an improper foundation.[492] Buckeye argues that the market definitions for the destination markets proposed by Dr. Arthur in his direct testimony are consistent with the *Enterprise TE* methodology, but the definitions accepted by the Presiding Judge from Dr. Arthur's rebuttal testimony are not.[493]

195. Buckeye also specifically challenges the inclusion of Berks County in the Harrisburg destination market and the Presiding Judge's conclusion that Buckeye possesses market power related to its deliveries to terminals in Berks County.[494] Buckeye argues that while Berks County terminals were found to be cost-effective external suppliers to a substantial number of counties in the Harrisburg destination market,[495] it does not follow that Berks County should be included. In particular, Buckeye asserts that Mr. Siskind did not make the showing required by *Enterprise* that trucks emanating from terminals near the center of the Harrisburg destination market (terminals in the vicinity of the City of Harrisburg) are able to cost-effectively supply Berks County.[496] Buckeye claims that Dr. Arthur's delivered price test analysis shows that Berks County could not be cost-effectively supplied by terminals in the vicinity of the City of Harrisburg.[497]

196. Buckeye claims that the Complainants and Trial Staff failed to meet their burden to identify the competitors to Buckeye in their proposed larger Harrisburg destination market.[498] Buckeye argues that if Buckeye deliveries to terminals in Berks County were appropriately included, numerous additional counties to the east and north of Harrisburg

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[491] 146 FERC ¶ 61,157.

[492] *Id.* at 59-62 (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at PP 31, 40).

[493] *Id.* at 62-63; *see also* Buckeye Brief Opposing Exceptions at 48-49, 61-62.

[494] *Id.* at 63-68, 81.

[495] *Id.* at 64 (citing Ex. BPL-1 at 49-51; Ex. GP-80 at 73-74, Tr. 1792-93).

[496] *Id.* at 65-66 (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at P 31, 40).

[497] *Id.* at 66 (citing Ex. GP-117 at 130-137).

[498] *Id.* at 64.

should also be included.[499] Buckeye claims that Dr. Schink's delivered price test analysis results support excluding Berks County.[500]

197. Buckeye claims that Berks County should be found to be part of the Philadelphia destination market. Buckeye argues that Berks County was included in the Philadelphia BEA at the time of Buckeye's initial application for market-based rates and was included in the Philadelphia BEA in all prior market-based rate matters where the Philadelphia area was a destination market. Buckeye claims that Buckeye-supplied terminals in Berks County face competition from alternatives located throughout the Philadelphia BEA.[501]

198. The Complainants challenge the Presiding Judge's rejection of Dr. Arthur's proposal at hearing to exclude Franklin and Adams Counties in the Harrisburg destination market.[502] The Complainants argue that Dr. Arthur's delivered price test analysis does not find Buckeye to be competitive in those counties when the closed terminal served by Buckeye in Lancaster is properly removed.

iii. Briefs Opposing Exceptions

199. The Complainants argue that the Presiding Judge properly determined the relevant Pittsburgh geographic market,[503] and included Berks County in the Harrisburg destination market based on Dr. Arthur's delivered price methodology.[504] The Complainants also assert that Buckeye's claim that deliveries to terminals in Berks County cannot be subject to an order altering its market-based rate authority is meritless.[505]

200. Buckeye argues that the Presiding Judge correctly rejected Dr. Arthur's third attempt to define the geographic market for the Harrisburg destination market at hearing, but that Dr. Arthur's first and second attempts are also flawed and unreliable.[506] Buckeye

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[499] *Id.* at 63-64, 67.

[500] *Id.* at 67.

[501] *Id.* at 67-68 (citing Ex. BPL-67 at 70-71, Tr. 1447-1448, 1562, 1733-1742).

[502] Complainants Brief on Exceptions at 80-82.

[503] Complainants Brief Opposing Exceptions at 61.

[504] *Id.* at 44-48.

[505] *Id.* at 48.

[506] Buckeye Brief Opposing Exceptions at 79-96.

claims that in rejecting Dr. Arthur's third definition, the Presiding Judge correctly found that the removal of the Lancaster terminal from Dr. Arthur's delivered price test analysis produced illogical changes in the geographic definition of the market and in the number of competitors operating in the geographic market.[507] In contrast, Buckeye claims that Dr. Schink's delivered price test analysis produces logical results. Buckeye also claims that Dr. Arthur's second attempt to define the Harrisburg destination market in his rebuttal testimony is unreliable because it incorrectly assumes that the Lancaster terminal is operational.[508] In addition, Buckeye argues that Dr. Arthur's proposed definition from his direct testimony is riddled with errors, and not all of the errors were corrected in his revised definition in his rebuttal testimony.[509] Buckeye argues that the pervasive errors and shifting definitions render Dr. Arthur's analysis of the Harrisburg destination market unreliable.[510]

201. Trial Staff argues that the Commission should affirm the Presiding Judge's determination of the relevant geographic market for the Harrisburg destination market.[511] Trial Staff argues that the methodology accepted by the Commission in *Enterprise TE* for determining geographic markets in that case should not be followed in this proceeding.[512] Trial Staff argues that as Buckeye and Sunoco are the only refined products pipelines located in the vicinity of central and northeast Pennsylvania, an expansion of the geographic market to include additional counties would likely have no meaningful impact on the market power statistics for the Harrisburg market or would increase the calculated HHI.[513] Trial Staff supports the Presiding Judge's finding that Berks County should be included in the Harrisburg destination market.[514] Trial Staff also argues that the Presiding Judge appropriately rejected Dr. Arthur's revisions introduced at hearing, but in

[507] *Id.* at 81-90.

[508] *Id.* at 90-91.

[509] *Id.* at 91-96 (listing ten alleged errors).

[510] *Id.* at 96.

[511] Trial Staff Brief Opposing Exceptions at 42-47.

[512] *Id.* at 43-44 and n.83 (citing Tr. 1565).

[513] *Id.* at 44.

[514] *Id.* at 45-46.

any event such finding reflects a conservative approach and does not impact the ultimate conclusion that Buckeye has significant market power in the Harrisburg market.[515]

iv. Commission Determination

202. As discussed below, the Commission affirms the Presiding Judge's definition of the Pittsburgh and Harrisburg destination markets. Dr. Arthur based his definition of the geographic markets on his delivered price test. As stated by the Presiding Judge, and discussed above, Dr. Arthur's delivered price test utilized an appropriate proxy for the competitive price (Buckeye's prevailing rate), employed the Commission's preferred SSNIP of 15 percent,[516] and included appropriate allowances for non-price factors.[517]

203. The Commission affirms the Presiding Judge's adoption of Dr. Arthur's Pittsburgh destination market, as modified in his rebuttal testimony.[518] The Presiding Judge correctly found that Dr. Arthur's changes to his Pittsburgh destination market made on rebuttal were "appropriate as they were based on criticisms in the answering testimony of Dr. Schink and Mr. Siskind."[519] The decision to accept Dr. Arthur's modifications on rebuttal was in the discretion of the Presiding Judge.[520]

204. The Commission affirms the Presiding Judge's rejection of Buckeye's argument that Dr. Arthur's methodology was flawed in that it did not follow the methodology approved by the Commission in *Enterprise TE*.[521] Geographic markets are determined on a case-by-case basis. That a methodology was approved in *Enterprise TE* does not require all subsequent proceedings to adopt the same methodology. Buckeye's witness

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[515] *Id.* at 46-47.

[516] *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157, at P 43 n.65 (2014).

[517] Initial Decision, 155 FERC ¶ 63,008 at P 285.

[518] *Id.* P 285.

[519] *Id.* P 286.

[520] *See ANR Storage*, Opinion No. 538, 153 FERC ¶ 61,052, at P 57 (2015).

[521] Initial Decision, 155 FERC ¶ 63,008 at P 287 (citing *Enterprise TE*, Opinion No. 529, 146 FERC ¶ 61,157 at PP 31, 40).

agreed that following the same methodology in this proceeding may lead to inappropriate results.[522]

205. The Commission also affirms the Presiding Judge's adoption of Dr. Arthur's definition of the Harrisburg destination market, as set forth in his rebuttal testimony.[523] As discussed, Dr. Arthur utilized an appropriate methodology in his delivered price test when defining the relevant Harrisburg market. The Commission concurs with the Presiding Judge that because the terminals in Berks County are "integral in determining the price of pipelineable refined petroleum products throughout most of Harrisburg, Berks County should be included in the geographic market."[524] It is clear from the record that product delivered to the terminals in Berks County, the Sinking Spring terminals, is consumed in the Harrisburg destination market.[525]

206. The Commission agrees with the Presiding Judge that although Berks County was not included in the geographic market at the time Buckeye was granted market-based rate authority, if the current definition of the Harrisburg destination market includes Berks County then market-based rates at that location are within the scope of this proceeding.[526] The Hearing Order established a proceeding to ascertain Buckeye's market power in Harrisburg, Pittsburgh and Chelsea Junction, Pennsylvania affecting the Complainants.[527] Just as the reference to Chelsea Junction did not specifically define the extent of the appropriate origin market, the requirement to examine market power in Harrisburg was predicated on a subsequent determination of the proper definition of the Harrisburg market, which as determined in the hearing proceeding includes Berks County.

207. The Commission also affirms the Presiding Judge's determination to reject Dr. Arthur's proposal at hearing to exclude Franklin and Adams Counties in the Harrisburg destination market. Although the Complainants challenge this determination, the Presiding Judge adopted a conservative approach that nonetheless found the

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[522] *Id.* P 287.

[523] *Id.* P 301.

[524] *Id.* P 302.

[525] *Id.* P 303.

[526] *Id.* P 304.

[527] Hearing Order, 147 FERC ¶ 61,088 at P 44.

Complainants met their burden to show Buckeye possesses market power in the Harrisburg destination market.

9. Competitive Alternatives

a. The Origin Market

i. Initial Decision

208. The Presiding Judge noted that the parties' identification of competitive alternatives for the Chelsea Junction origin market differed as follows: (a) the Complainants include pipeline transportation (Sunoco 90 thousand barrels per day (MBPD)), sales over local truck racks (46.5 MBPD) and barge transportation (41.7 MBPD);[528] (b) Buckeye includes pipeline transportation (Colonial 950 MBPD and Sunoco 271.6 MBPD), sales over local truck racks (253.3 MBPD) and waterborne movements (103.6 MBPD);[529] and (c) Trial Staff includes pipeline transportation (Sunoco 230.2 MBPD), sales over local truck racks (46.5 MBPD) and waterborne movements (41.7 MBPD).[530] The Presiding Judge found that the parties did not dispute including pipeline transportation on Sunoco and waterborne barge transportation as competitive alternatives and that it was appropriate to do so.[531]

209. Buckeye claimed that the Complainants' identification of the competitive alternatives is too narrow as it rests on Dr. Arthur's overly narrow definition of the geographic market as limited to alternatives that are physically connected to PBF's Delaware City Refinery, while the Complainants argued that Buckeye's competitive alternatives are based on an overly broad definition of the geographic market.[532] The Presiding Judge stated that she rejected "Dr. Schink's overly broad geographic definition of the origin market based on the use of exchanges and therefore does not adopt Dr. Schink's competitive alternatives, i.e. Colonial's capacity of 950 [MBPD], that are

[528] Initial Decision, 155 FERC ¶ 63,008 at P 306 (citing Ex. GP-2 at 100-121).

[529] *Id.* P 310 (citing Ex. BPL-1 at 59-61; Ex. BPL-87 at 1).

[530] *Id.* P 312 (citing Ex. S-5 at 64).

[531] *Id.* P 316.

[532] *Id.* PP 309, 311.

not available to shippers originating product at [Buckeye's] Chelsea Junction origin point."[533]

210. The parties also disagreed over whether additional incremental sales over local truck racks are a good alternative. The Presiding Judge noted that the Complainants excluded such sales, whereas Buckeye and Trial Staff argued that sales over local truck racks are a good alternative. The Presiding Judge determined that sales over local truck racks are properly included as a competitive alternative in the origin market. The Presiding Judge found that Dr. Arthur's reason for excluding sales over local truck racks was unpersuasive and was contradicted by his own netback analysis which showed that sales over local truck racks are competitive in terms of price.[534]

ii. Briefs on Exceptions

211. On exceptions, the Complainants argue that the Presiding Judge erroneously included sales over local truck racks as a competitive alternative in the Chelsea Junction origin market.[535] The Complainants claim that Dr. Arthur's conclusion that sales over the local truck racks are not competitive with Buckeye is consistent with his netback price methodology. The Complainants argue that conventional gasoline transported on Buckeye cannot be sold over the local truck racks at the Delaware City Refinery, as only reformulated gasoline is sold in that manner. As a result, the only volumes that could be diverted from Buckeye in response to a rate increase are reformulated gasoline volumes currently transported to the Pittsburgh metro area, which have a significantly higher netback price than sales over the local truck racks.[536] The Complainants assert that there would have to be over a 100 percent rate increase on Buckeye before the netback to Pittsburgh would be less than the netback received for sales over the local truck rack, and thus there would be a severe financial penalty to anyone shifting volumes from Buckeye to the local truck rack. In addition, in order to increase sales over the local truck rack, the Delaware City Refinery would have to lower the prices on all volumes sold, thereby

[533] *Id.* P 315.

[534] *Id.* P 313 (citing Ex. GP-1 at 10-11; GP-2 at 115); *id.* P 316.

[535] Complainants Brief on Exceptions at 57-60.

[536] *Id.* at 58 (citing Ex. GP-32 at 16; Tr. 1062-1070).

decreasing revenue to PBF.[537] Finally, Complainants assert that because Sunoco lines have been at capacity, volumes cannot be shifted from Buckeye to Sunoco.[538]

212. Buckeye argues on exceptions that the Presiding Judge erred by rejecting the appropriate methodology for defining effective capacity for the origin market.[539] This argument is addressed below in Section 10.

iii. Briefs Opposing Exceptions

213. Buckeye argues that the Presiding Judge correctly concluded that sales over truck racks should be included as competitive alternatives in the origin market.[540] Buckeye claims that Dr. Arthur testified that truck rack sales are a competitive alternative.[541] Buckeye argues that Dr. Arthur's netback comparison associated with reformulated gasoline truck rack sales is an invalid apples-to-oranges comparison as it actually compares a conventional gasoline netback from Pittsburgh against a reformulated gasoline netback for Philadelphia area truck rack sales.[542] In any event, Buckeye refutes the Complainants' implication that only reformulated gasoline is relevant to determining whether Philadelphia area truck rack sales are a competitive alternative.[543]

iv. Commission Determination

214. The Commission affirms the Presiding Judge's determination of the competitive alternatives available in the origin market. The competitive alternatives include transportation on the Sunoco pipeline, sales over local truck racks, and waterborne transportation. There was no dispute as to the inclusion of the Sunoco pipeline or waterborne alternatives. The Presiding Judge properly excluded capacity on the Colonial pipeline, as it was only available through the use of exchanges and therefore, as

[537] *Id.* at 58-59 (citing Ex. GP-1 at 10-11, Ex. GP-80 at 114).

[538] *Id.* at 59.

[539] Buckeye Brief on Exceptions at 72-75.

[540] Buckeye Brief Opposing Exceptions at 28-36.

[541] *Id.* at 29 (citing Ex. GP-80 at 171 and Ex. GP-32 at 16).

[542] *Id.* at 29-31.

[543] *Id.* at 31.

discussed, not appropriate to include as a competitive alternative.[544] Sales over truck racks were properly included by the Presiding Judge, as they satisfied the delivered price test methodology of Dr. Arthur as adopted in this proceeding.[545]

b. The Pittsburgh Destination Market

i. Initial Decision

215. The Presiding Judge found that all parties agree that the competitive alternatives in the Pittsburgh destination market include the Sunoco and Marathon pipelines, the Ergon Refinery in Newell, West Virginia, and inbound water transportation.[546] However, the parties disputed the proper estimate of waterborne transportation and whether the Warren Refinery is a good alternative.

216. As to the calculation of waterborne deliveries, the Presiding Judge accepted the Complainants' calculation of 24 MBPD and rejected Buckeye's calculation of 28.9 MBPD. The Presiding Judge stated that the Complainants argued that Dr. Schink's 28.9 MBPD figure is based on estimates of deliveries on the Ohio River, upstream of Pittsburgh, while Dr. Arthur's 24 MBPD estimate is based on actual reported volumes of waterborne deliveries into the Port of Pittsburgh from the United States Army Corps of Engineers (Army Corps) and consistent with Buckeye's internal documents.[547] The Presiding Judge found Dr. Arthur's estimate of waterborne deliveries more reliable than Dr. Schink's, because Dr. Arthur's estimate is based on figures published by the Army Corps and consistent with Buckeye's internal documents.[548]

217. The Presiding Judge also determined that the Warren Refinery is a good alternative. The Presiding Judge observed that the Complainants argued that the Warren Refinery is not competitive in terms of price and does not produce the grade of gasoline that is required in Pittsburgh during summer months.[549] In contrast, Buckeye

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[544] Initial Decision, 155 FERC ¶ 63,008 at P 315.

[545] *Id.* P 316.

[546] *Id.* P 331.

[547] *Id.* P 328 (citing Ex. BPL-13 at 7; Ex. GP-24).

[548] *Id.* P 331.

[549] *Id.* P 319 (citing Ex. GP-80 at 118-121; Tr. 727-39, 850-865; GP-70 at 5-6).

and Trial Staff argued that the Warren Refinery is a good alternative.[550] The Presiding Judge found there is evidence of trucking from the Warren Refinery to the Pittsburgh destination market, even though Dr. Arthur's delivered price test found that the Warren Refinery was not a competitive supplier to any county in Pittsburgh, and in fact that the Warren Refinery was not competitive anywhere including right outside of its own refinery gates.[551] The Presiding Judge concluded that "the evidence suggests that the validity of posted rack prices at the Warren Refinery may not accurately represent the wholesale price of product that is supplied from there."[552]

ii. Briefs on Exceptions

218. On exceptions, the Complainants argue that the Presiding Judge erroneously included the Warren Refinery as a competitive alternative to Buckeye in the Pittsburgh destination market because (1) Guttman rarely sources volumes for the Pittsburgh area from the Warren Refinery,[553] (2) the refinery does not produce the grade of gasoline that is required in the counties surrounding the Pittsburgh metro area during the summer season, (3) the refinery is more likely to supply barrels to the Erie and Buffalo markets than to the more distant Pittsburgh market, and (4) Dr. Arthur's delivered price test analysis provides evidence that the refinery is not competitive with Buckeye in terms of price in the counties surrounding Pittsburgh.[554] In addition, the Complainants argue that the Presiding Judge failed to take into account Trial Staff's observation that including the Warren Refinery as a competitive alternative could overstate the degree of competition Buckeye faces in the Pittsburgh destination market.[555] The Complainants argue that the Presiding Judge ignored the fact that Dr. Arthur's estimate of waterborne volumes, which the Presiding Judge accepts, is also conservatively high, thus further overstating the degree of competition in the Pittsburgh destination market.[556]

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[550] *Id.* PP 320, 332.

[551] *Id.* P 333 (citing Tr. 738-39; 860-861).

[552] *Id.* P 333.

[553] Complainants Brief on Exceptions at 71-74.

[554] *Id.* at 71-72 (citing Ex. GP-70 at 5-6; Ex. GP-80 at 118-121).

[555] *Id.* at 73 (citing Initial Decision, 155 FERC ¶ 63,008 at P 324).

[556] *Id.* at 74.

219. Buckeye argues on exceptions that the Presiding Judge erred by rejecting the appropriate methodology for defining effective capacity for the Pittsburgh destination market.[557] This argument is addressed below in Section 10.

iii. Briefs Opposing Exceptions

220. Buckeye argues that the Presiding Judge properly included the Warren Refinery as a good alternative in the Pittsburgh market.[558] Buckeye also claims that the Complainants' argument that Dr. Arthur's estimate of waterborne deliveries is conservatively high is contradicted by record evidence indicating that the actual waterborne deliveries are most likely higher than Dr. Arthur's estimate.[559]

iv. Commission Determination

221. The Commission affirms the Presiding Judge's determination of competitive alternatives in the Pittsburgh destination market. These competitive alternatives include the Sunoco and Marathon pipelines, the Ergon Refinery in Newell, West Virginia, the Warren Refinery, and inbound waterborne transportation.[560] The Presiding Judge found that by following Dr. Arthur's delivered price test, the Warren Refinery was not competitive anywhere, including right outside its own refinery gates, despite evidence of trucking from the Warren Refinery to Pittsburgh that shows that the Warren Refinery does supply a portion of the market.[561] The Presiding Judge properly concluded that the validity of the posted wholesale price data at Warren could not be determined, and that the comparison of price data from Pittsburgh and Buffalo, combined with the evidence of trucking, was a more appropriate way to determine whether the Warren Refinery was a competitive alternative.[562]

222. The Commission also affirms the Presiding Judge's use of Dr. Arthur's estimates of waterborne transportation capacity, as it was based on published figures in the Army Corps' Waterborne Commerce report.[563] Capacity calculations of the various

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[557] Buckeye Brief on Exceptions at 68-72.

[558] Buckeye Brief Opposing Exceptions at 62-67.

[559] *Id.* at 67-71.

[560] Initial Decision, 155 FERC ¶ 63,008 at P 331.

[561] *Id.* P 333.

[562] *Id.*

[563] *Id.* P 331.

competitive alternatives in the relevant markets is more fully discussed below in section 10, Market Power Statistics.

c. The Harrisburg Destination Market

i. Initial Decision

223. The Presiding Judge noted that the Complainants initially supported a finding that the competitive alternatives in the Harrisburg destination market include Sunoco pipeline, Colonial pipeline, and Plantation pipeline. However, at the hearing Dr. Arthur amended his delivered price test to reflect Buckeye's termination of service to the Lancaster terminal and on that basis excluded terminals located in Baltimore supplied by Colonial and Plantation as competitive alternatives, leaving Sunoco as the only competitive alternative.[564] Trial Staff and Buckeye argued that the terminals located in Baltimore should be included as competitive alternatives.[565]

224. The Presiding Judge found that including Colonial and Plantation pipelines as competitive alternatives was appropriate. The Presiding Judge agreed that "it was improper for Dr. Arthur to exclude the Lancaster terminal from his delivered price test, which then resulted in the terminals located in Baltimore supplied by Colonial and Planation pipelines to be excluded as competitive alternatives."[566] The Presiding Judge found that "the evidence shows that the Lancaster terminal was relatively small and that Dr. Arthur's delivered price test showed that the Colonial and Plantation pipelines continue to be competitive in Adams County and Franklin County, which are part of the Harrisburg geographic market," and that including the terminals is a conservative approach.[567]

225. The Presiding Judge noted that the parties' main dispute was whether inbound truck shipments from Philadelphia and Baltimore (outside the Harrisburg destination market) should be considered a competitive alternative. Buckeye argued that truck deliveries from Baltimore and Philadelphia provide significant competitive alternatives in

[564] *Id.* P 334 (citing Ex. GP-80 at 107; Ex. GP-99 at 2; Ex. GP-117 at 2).

[565] *Id.* P 335.

[566] *Id.* P 357.

[567] *Id.*

the Harrisburg destination market, while Trial Staff and the Complainants claimed that the actual potential competitive impact is minimal.[568]

226. The Presiding Judge explained Buckeye's view that truck deliveries from Baltimore and Philadelphia provide significant competitive alternatives. The Presiding Judge noted that Dr. Schink maintained that Philadelphia area supply sources are competitive alternatives to every county in the Harrisburg destination market.[569] In addition, Buckeye claimed there is evidence that truck movements from Baltimore and Philadelphia are cost-effective suppliers to the Harrisburg destination market based primarily on third-party subpoena responses and alleged phone interviews.[570] The Complainants and Trial Staff argued that the evidence does demonstrate significant competition.[571]

227. The Presiding Judge found based on third party subpoena evidence that "the competitive impact of inbound truck shipments from Philadelphia and Baltimore is minimal and therefore not significant enough to be considered a competitive alternative in the Harrisburg destination market."[572]

228. The Presiding Judge found that Dr. Schink's analysis of competitive alternatives in the Harrisburg market regarding trucking should be given little weight because Dr. Schink "relied on indirect hearsay evidence from employees of [Buckeye's] affiliated companies who were not subject to cross-examination" and reliable subpoena evidence directly contradicted the information in Dr. Schink's interview notes,[573] which "do not constitute verifiable and quantifiable evidence."[574]

229. The Presiding Judge described Buckeye's argument that conventional gasoline is available at Baltimore terminals based on subpoena responses and [Buckeye's] telephone conversations with jobbers and terminal personnel. Buckeye argued that conventional

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[568] *Id.* PP 336-340.

[569] *Id.* P 336.

[570] *Id.* PP 339-344.

[571] *Id.* PP 345-356.

[572] *Id.* P 358 (citing Ex. S-15 at 15-16; Ex. S-18; Ex. S-21; Ex. GP-132).

[573] *Id.* P 360 (citing Ex. S-19 at 4-5, 7, 10-13).

[574] *Id.* P 343 (citing Ex. BPL-67 at 81-82; Ex. BPL-752; Ex. BPL-746, Ex. GP-108; Ex. GP-134; Ex. S-17).

gasoline is available in both Baltimore and Philadelphia, and reformulated gasoline can be sold in conventional markets like Harrisburg, and for some months reformulated gasoline was lower-priced than conventional gasoline in Fairfax, Virginia.[575] The Presiding Judge found this evidence did not support a finding that trucking is a good competitive alternative as "there was no evidence that storage for conventional gasoline actually occurred in [Buckeye's] terminal in Baltimore, or that any such stored conventional gasoline was delivered to locations within Pennsylvania" and in addition "storage of conventional gasoline does not equate to deliveries of conventional gasoline to the Harrisburg destination market."[576]

230. In addition, the Presiding Judge found that "the fact that OPIS rack prices for Baltimore and Philadelphia are only available for reformulated gasoline and are not available for conventional gasoline, strongly indicates that no significant quantity of conventional gasoline is available for purchase at terminals equipped with truck racks in those areas."[577] The Presiding Judge agreed with Trial Staff that Dr. Schink's analysis improperly created conventional gasoline prices where OPIS rack prices did not exist.[578] The Presiding Judge found that it was improper for Dr. Schink to thus create conventional gasoline prices for his delivered price analysis.[579]

231. The Presiding Judge rejected Buckeye's arguments that (1) in the original proceeding granting Buckeye's market-based rate authority, there was no volume data on truck movements from Baltimore and Philadelphia terminals to the Harrisburg market, and (2) in 2007, Trial Staff's witness in *Sunoco Pipeline, L.P.* testified that he had no competitive concerns about the Harrisburg market despite a high HHI.[580] The Presiding Judge found this argument unpersuasive because "the determination of whether a pipeline has market power is a fact-specific inquiry that should be determined on a case-by-case basis with the most current information available."[581]

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[575] *Id.* (citing Ex. BPL-138).

[576] *Id.* P 361.

[577] *Id.* P 362.

[578] *Id.* P 337.

[579] *Id.* P 362.

[580] *Id.* P 340 (citing *Sunoco Pipeline, L.P.*, 118 FERC ¶ 61,266).

[581] *Id.* P 349.

ii. Briefs on Exceptions

232. The Complainants argue on exceptions that the Presiding Judge erroneously included the closed Lancaster terminal in the delivered price test for the Harrisburg destination market and as such, erroneously included Colonial and Plantation pipelines as competitive alternatives to Buckeye in the Harrisburg destination market.[582]

233. On exceptions, Buckeye challenges the Presiding Judge's conclusions regarding truck movements from Baltimore and Philadelphia terminals to the Harrisburg market.[583] Buckeye argues that in the original proceeding granting Buckeye's market-based rate authority in 1990 there was no specific volume data presented on truck movements from Baltimore or Philadelphia area terminals to the Harrisburg market, but Trial Staff's witness nonetheless presented a delivered price test that showed truck movements were cost-effective competitors.[584] Buckeye argues that for this reason the Commission found in Opinion No. 360 that the Harrisburg destination market was competitive despite Buckeye's high market share.[585] Although the Presiding Judge found that market power determinations are fact-specific, Buckeye argues that the fact that trucking from Baltimore and Philadelphia was the primary driver of the Commission's initial holding that Buckeye lacked market power in the Harrisburg destination market cannot be ignored.[586]

234. Buckeye argues that the Presiding Judge erred in rejecting evidence presented by Buckeye that shows trucks continue to be a source of competition. This includes evidence from a company witness that truck competition continues to exist in the Harrisburg market, bills of lading and storage availability from terminals in Baltimore and Philadelphia, statements from operators at Buckeye's affiliated terminals, and Dr. Schink's delivered price test analysis showing that trucks from Baltimore and Philadelphia area terminals can cost-effectively supply the Harrisburg destination market.[587] In addition, Buckeye argues that the Presiding Judge's rejection of the

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[582] Complainants Brief on Exceptions at 80.

[583] Buckeye Brief on Exceptions at 88-92.

[584] *Id.* at 88 (citing *Buckeye Pipe Line Co.*, Opinion 360, 53 FERC ¶ 61,473 (1990)).

[585] *Id.* (citing Ex. BPL-1 at 10-11, 47-52; Tr. 948-950).

[586] *Id.* at 89-90.

[587] *Id.* at 90.

evidence regarding storage was inconsistent with Commission precedent holding that the availability of storage is relevant to competition.[588]

235. Buckeye claims that the Presiding Judge failed to consider whether an increase in truck movements would be likely to occur if Buckeye were to increase its rates. Buckeye asserts such an investigation would have considered the likelihood of increased truck competition into Harrisburg, but instead the Presiding Judge erroneously relies on the cellophane fallacy to find that Buckeye's current rates are at or above competitive levels.[589] Buckeye claims to have demonstrated that truck competition could increase in the Harrisburg destination market if Buckeye were to increase its rates by providing evidence that trucks are already moving to the Harrisburg destination market from Baltimore and Philadelphia, both locations have easy highway access to the counties in the Harrisburg destination market, and there is available and potential storage capacity.[590]

236. Buckeye argues that the Presiding Judge erred in not considering evidence regarding refined petroleum products apart from conventional gasoline.[591] Buckeye claims the Presiding Judge's exclusive focus on conventional gasoline contradicts the relevant product market of "the transportation of all pipelineable refined petroleum products."[592] Buckeye claims that record evidence shows the following: reformulated gasoline can be used in place of conventional gasoline;[593] jet fuel was moving by truck into the Harrisburg market;[594] jet fuel is supplied to the Harrisburg airport, not by Buckeye, but by a competitor via truck;[595] and a significant portion of Buckeye's volumes flowing to the Harrisburg market are distillates, which face significant competition from trucks.[596]

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[588] *Id.* at 91 (citing *ANR Storage Co.*, 153 FERC ¶ 61,052, at P 107 (2015)).

[589] *Id.* at 91.

[590] *Id.* at 92.

[591] *Id.* at 92-93.

[592] *Id.* at 92 (quoting Initial Decision, 155 FERC ¶ 63,008 at P 263).

[593] *Id.* at 93 (citing Ex. S-17; Tr. 971-972; Ex. BPL-138).

[594] *Id.* (citing Ex. BPL-67 at 85).

[595] *Id.*

[596] *Id.* (citing Tr. 1942-1952; Ex. BPL-982).

iii. Briefs Opposing Exceptions

237. The Complainants and Trial Staff argue that the Presiding Judge correctly determined that trucking from Philadelphia and Baltimore does not constitute a competitive alternative to Buckeye in the Harrisburg destination market as the evidence showed that trucking from Baltimore and Philadelphia area terminals is minimal.[597]

238. Trial Staff challenges Buckeye's argument regarding the role of trucking volume data in Buckeye's original market-based rate proceeding. Trial Staff argues that the Presiding Judge found that conventional gasoline is no longer available in meaningful quantities in the Baltimore and Philadelphia areas for truck deliveries to the Harrisburg

[597] Complainants Brief Opposing Exceptions at 54-60; Trial Staff Brief Opposing Exceptions at 50-55.

market, and in any event, Opinion No. 360 implicitly rejected the trucking estimates because they overstated potential competition from trucking.[598]

239. The Complainants and Trial Staff argue that the Presiding Judge did not fail to consider the potential trucking competition if Buckeye were to increase its rates to the Harrisburg market because Dr. Arthur's delivered price methodology, adopted by the Presiding Judge, evaluates the degree of competition at increased prices.[599]

240. The Complainants and Trial Staff argue that the Presiding Judge did not adopt an overly narrow focus on conventional gasoline.[600]

iv. Commission Determination

241. The Commission affirms the Presiding Judge's determination of competitive alternatives in the Harrisburg destination market.[601] The competitive alternatives include the Colonial, Sunoco, and Plantation pipelines. The Presiding Judge correctly excluded truck deliveries from Baltimore and Philadelphia as competitive alternatives.[602] Buckeye's claim that truck movements from Baltimore and Philadelphia were found to be competitive in Opinion No. 360 without specific volume data is not binding on the Commission's analysis of the evidence of trucking in this proceeding. The Presiding Judge appropriately analyzed the facts in the record, recognizing that "the determination of whether a pipeline has market power is a fact-specific inquiry that should be determined on a case-by-case basis with the most current information available."[603] In addition, the Commission agrees with the Complainants and Trial Staff that the Presiding

[598] Trial Staff Brief Opposing Exceptions at 51 (citing Initial Decision at PP 361,362, 404).

[599] Trial Staff Brief Opposing Exceptions at 52-53; Complainants Brief Opposing Exceptions at 59.

[600] Complainants Brief Opposing Exceptions at 59-60; Trial Staff Brief Opposing Exceptions at 53-55.

[601] Initial Decision, 155 FERC ¶ 63,008 at P 357.

[602] *Id.* P 358.

[603] *Id.* P 349.

Judge did not adopt an overly narrow focus on conventional gasoline, as Buckeye claims.[604]

242. The Commission affirms the Presiding Judge's finding that it was improper for the Complainants to exclude the Lancaster terminal from the delivered price test, which resulted in the terminals located in Baltimore supplied by Colonial and Plantation pipelines to be excluded as competitive alternatives. Although service to the Lancaster terminal ended in mid-2015, Dr. Arthur's delivered price test demonstrated that the Colonial and Plantation pipelines continued to be competitive in the Harrisburg destination market.[605]

243. The Commission also affirms the Presiding Judge's exclusion of inbound truck shipments from the list of competitive alternatives.[606] The Presiding Judge properly weighed the evidence provided by Dr. Schink regarding trucking compared to what the Presiding Judge described as "more reliable" subpoena evidence.[607] The Presiding Judge found little evidence of storage utilization in Harrisburg,[608] which Buckeye argued would support a finding that trucking is a competitive alternative.[609] The Presiding Judge also correctly determined that the absence of OPIS rack prices for Baltimore and Philadelphia for conventional gasoline "strongly indicates that no significant quantity of conventional gasoline is available for purchase at terminals with truck racks in those areas."[610]

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[604] *See id.* P 355 (citing Tr. 2032-2033 (Siskind); Ex. S-18).

[605] *Id.* P 357.

[606] *Id.* P 358.

[607] *Id.* P 360.

[608] The question of whether storage in general should be considered in determining competitive alternatives is a question of product market definition. Whether individual storage providers should be included is a question of competitive alternatives.

[609] *Id.* P 361.

[610] *Id.* P 362.

10. Market Power Statistics

a. Methodology

i. Initial Decision

244. The Presiding Judge followed Order No. 572's policy that it is useful to obtain a showing of market concentration using the Herfindahl-Hirschman Index based on capacity.[611] While recognizing that the Commission has not imposed a firm threshold for HHI and market share levels as an indicator of market power, the Presiding Judge found that a calculated HHI less than 2,500 generally shows that a market is sufficiently competitive, while a HHI greater than 2,500 shows that a market is concentrated.[612]

245. The Presiding Judge noted that the parties disagreed regarding how waterborne deliveries and waterborne shipments should impact effective capacities, and how trucking from Baltimore and Philadelphia should impact effective capacities. As discussed above, the Presiding Judge rejected Buckeye's argument regarding the competitive impact of trucking from Baltimore and Philadelphia for the Harrisburg market.[613]

246. Regarding the role of waterborne shipments, Buckeye argued that Commission precedent supported subtracting waterborne transportation. For the origin market, Dr. Schink calculated effective capacity as the lesser of actual capacity and refinery output less sales over local truck racks less outbound waterborne movements.[614] For the Pittsburgh destination market, Dr. Schink calculated effective capacity as the lesser of actual capacity and available consumption, which is total local consumption less waterborne deliveries.[615]

247. The Presiding Judge found that the Commission's methodology approved in *Williams* defines effective capacity as the "actual capacity or total consumption if that is

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[611] *Id.* P 222.

[612] *Id.*

[613] *See id.* PP 223, 358.

[614] *Id.* P 366.

[615] *Id.* P 224.

smaller."[616] The Presiding Judge found that Dr. Schink's approach of subtracting waterborne transportation when calculating effective capacity is not supported by *Williams*.[617] The Presiding Judge rejected Dr. Schink's approach of calculating effective capacities in the origin and Pittsburgh destination market.[618]

ii. Brief on Exceptions

248. On exceptions, Buckeye argues that the Presiding Judge's conclusions regarding the role of waterborne shipments in determining effective capacity are in error, which caused the HHIs to be overstated.[619]

249. Regarding the Pittsburgh destination market, Buckeye argues that effective capacity is the lesser of the supplier's capacity and available local consumption less the actual waterborne deliveries of pipelineable refined petroleum products into the destination market. Buckeye explains that in a destination market, data regarding actual waterborne delivery markets is available and since such volumes are known to have been delivered by water, the consumption that they serve is a share of consumption that cannot currently be served by other supply sources such as inbound pipelines or local refineries. Buckeye asserts that this methodology, followed by Dr. Schink, is consistent with long-standing Commission precedent.[620]

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[616] *Id.* P 228 (quoting *Williams*, Opinion No. 391, 68 FERC, at 61,665 n.57 (1994)).

[617] *Id.* PP 228.

[618] *Id.* PP 372, 387.

[619] Buckeye Brief on Exceptions at 68-75.

[620] *Id.* at 69 (citing BPL-67 at 50, 59-61, 92, 95-96); *see also* BPL-67 at 61 (stating "[t]his approach has been used in: (1) Application of Colonial Pipeline Company for Authority to Charge Market-Based Rates (NEMA), FERC Dockets No. OR95-9-000 and OR00-3-000 analysis of its North East Market Area destination market (the Philadelphia and New York Harbor areas); (2) Application of Explorer Pipeline Company for Authority to Charge Market-Based Rates, FERC Docket No. OR99-1-000 analysis of its Houston, St. Louis, and Chicago destination markets; (3) Application of Colonial Pipeline Company for Authority to Charge Market-Based Rates (Gulf Coast), FERC Docket No. OR99-5-000 analysis of its Beaumont-Port Arthur, TX, Lafayette, LA, Baton Rouge-New Orleans, LA, and Jackson, MS destination markets, (4) Application of TE Products Pipeline Company, L.P. for Authority to Charge Market-Based Rates, FERC Docket No. OR99-6-000 analysis of its Houston, Beaumont, TX, Shreveport, Little Rock,

250. Buckeye argues that Dr. Arthur's methodology inappropriately defines effective capacity for a supplier as the lesser of that supplier's capacity and the total local consumption of pipelineable refined petroleum products within the destination market. In other words, Dr. Arthur improperly uses total local consumption instead of available local consumption, which is total consumption less waterborne deliveries. According to Buckeye, Dr. Arthur asserted that it is not appropriate to treat the inbound waterborne movements as unavailable to be supplied by refined products pipelines and refineries because the amount of inbound water movements could fluctuate with changing market prices. Buckeye argues that it is appropriate to take into account the fact that under current market conditions, market participants have determined the amount of refined products that they will transport into the destination market via barge and tanker, because an HHI analysis is conducted based on current market conditions. Therefore, Buckeye claims the Presiding Judge erred in adopting Dr. Arthur's methodology and rejecting Dr. Schink's methodology.

251. Buckeye claims that the Presiding Judge mistakenly relied on the definition of effective capacity adopted in *Williams* as "the actual capacity or total consumption if that is smaller."[621] Buckeye argues that the quoted statement from Trial Staff's witness in that proceeding distinguished between unadjusted capacity and effective capacity and did not provide any guidance on how waterborne deliveries might affect the definition of consumption to use in calculating effective capacity. Buckeye asserts that the Commission has uniformly accepted effective capacity calculations consistent with the approach used by Dr. Schink for the past two decades.

252. Regarding the origin market, Buckeye argues that the effective capacity is defined as the lesser of the outbound pipeline's capacity and available local refinery capacity, which is the total capacity of the origin market refineries to produce pipelineable refined petroleum products less waterborne movements out of the origin market less local consumption in the origin market. Using Dr. Arthur's origin market definition, the methodology would consider the output of PBF's Delaware City Refinery less PBF's barge movements from all the refineries in a refining area less PBF's sales over local truck racks.[622] Buckeye argues that, given that an HHI analysis is conducted based on current market conditions and thus prevailing market prices, the fact that under current market conditions market participants have determined the amount of refined products

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Memphis, TN, St. Louis, Evansville, Chicago-Gary-Kenosha, IL-IN-WI, and Cincinnati-Dayton destination markets; and (5) Sunoco Pipeline L.P. Application for Authority to Charge Market-Based Rates, FERC Docket No. OR05-7-000 analysis of its Cleveland, Detroit, New York, Philadelphia, Pittsburgh, and Toledo destination markets").

[621] *Id.* at 71 (quoting Initial Decision, 155 FERC ¶ 63,008 at P 228).

[622] *Id.* at 73 (citing Ex. BPL-1 at 12-15, Ex. BPL-67 at 95-96).

that they will transport out of the origin market via barge and tanker and the amount that will be sold over local truck racks should be taken into account. According to Buckeye, the remaining amount of local refinery production of refined products will be allocated by the market among the outbound pipelines. Buckeye asserts that Dr. Schink correctly followed this approach for calculating effective capacity for the origin market consistent with numerous prior market-based rate proceedings before the Commission. In contrast, Buckeye claims that Dr. Arthur incorrectly defined the effective capacity of each outbound pipeline as the lesser of that outbound pipeline's capacity and the total capacity of local refineries to produce pipelineable refined petroleum products. Buckeye argues that the Presiding Judge accepted overstated HHI calculations from Dr. Arthur and Mr. Siskind that are based on the unrealistically narrow origin market and improper effective capacity methodology.[623]

iii. Briefs Opposing Exceptions

253. The Complainants and Trial Staff argue that the Presiding Judge adopted the correct methodology for calculating effective capacity, consistent with *Williams*, which does not support subtracting waterborne transportation.[624] The Complainants and Trial Staff claim that while the Commission previously approved applications for market-based rate authority in which Dr. Schink's methodology for calculating effective capacities was used, the method for calculating effective capacity was not contested or litigated in those proceedings.[625]

254. Trial Staff argues that Dr. Schink's methodology incorrectly presumes that volumes currently moved into destination markets via waterborne transportation or cleared from origin markets via waterborne transportation or sales over local truck racks could not be shifted to pipeline alternatives.[626] The Complainants challenge Dr. Schink's approach regarding the competitiveness of waterborne deliveries to a destination market.[627] Trial Staff further argues that Dr. Schink's assumption is contradicted by witness testimony that waterborne transportation is the marginal outlet (i.e. provides the

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[623] *Id.* at 72-75.

[624] Complainants Brief Opposing Exceptions at 62-63; Trial Staff Brief Opposing Exceptions at 38-41.

[625] Complainants Brief Opposing Exceptions at 63; Trial Staff Brief Opposing Exceptions at 39.

[626] Trial Staff Brief Opposing Exceptions at 40.

[627] *See* Complainants Brief Opposing Exceptions at 65-66.

lowest netbacks) for production from the Delaware City Refinery, which suggests that a shifting of volumes in the origin market from waterborne transportation to pipeline alternatives would be expected.[628]

255. The Complainants claim that Dr. Schink's methodology can produce illogical results where the effective capacity of an alternative is less than its actual deliveries into the market.[629] The Complainants argue that Dr. Schink's elimination of waterborne deliveries inflates the competitive impact of waterborne deliveries.[630]

iv. Commission Determination

256. The Commission affirms the Presiding Judge. As the Commission first held in *Williams*, the proper measure of capacity is "effective" capacity.[631] Whereas actual capacity is the total physical capacity that could serve the market, the effective capacity is the actual capacity or total consumption in the market, whichever is smaller.[632] Using actual capacity can allow the market share of alternatives with higher and scalable capacities, such as waterborne deliveries, to be overstated.

257. The Commission also affirms the Presiding Judge's finding that Buckeye's treatment of waterborne deliveries is inappropriate.[633] Buckeye's approach of subtracting waterborne deliveries from total market consumption is contrary to *Williams*. Buckeye provides no support for the argument that demand for pipelines should be equal to total consumption of pipelineable refined petroleum products within the destination market less the actual waterborne deliveries of pipelineable petroleum products into the destination market.[634] This argument is predicated on the erroneous belief that waterborne deliveries are in all instances preferable to deliveries by pipeline. However, a rational purchaser of refined petroleum products looks primarily to price when examining potential sources of supply, and product delivered by pipeline at a lower rate than the

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[628] Trial Staff Brief Opposing Exceptions at 40-41.

[629] *Id.* at 63, 65 (citing Ex. GP-80 at 21-23).

[630] *Id.* at 66.

[631] *Williams*, Opinion No. 391, 68 FERC, at 61,665, n.57.

[632] *Id*.

[633] Initial Decision, 155 FERC ¶ 63,008 at P 224.

[634] Buckeye Brief on Exceptions at 68.

same commodity delivered by water will be preferable. The Presiding Judge properly rejected Buckeye's methodology for determining effective capacity.

b. HHI Calculations

i. Initial Decision

258. The Presiding Judge identified the following HHI figures for the origin market proposed by the parties:

- Complainants proposed an HHI of 3,332, which excluded sales over local truck racks as a competitive alternative.[635]
- Complainants also provided an alternative HHI calculation of 2,751, which assumed that all used alternatives were good alternatives.[636]
- Buckeye presented an HHI of 2,120 based on Dr. Schink's proposed geographic origin market.[637]
- Buckeye argued that under Complainants and Trial Staff's narrower definitions of the origin market, the HHI would be 1,497 based on Dr. Schink's method for calculating effective capacity by adjusting for waterborne shipments and trucking.[638]
- Trial Staff offered an HHI of 2,906.[639]

259. The Presiding Judge found that the calculated HHI for the origin market is between Dr. Arthur's alternative figure of 2,751 and Mr. Siskind's figure of 2,906, indicating the market is concentrated. The Presiding Judge rejected Buckeye's figures based on her findings discussed above that Dr. Schink's geographic definition of the origin market was overly broad and that Dr. Schink's methodology for calculating

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[635] Initial Decision, 155 FERC ¶ 63,008 at P 363.

[636] *Id.* P 365 (Table 4). The Complainants asserted that if Sunoco were removed as a competitive alternative because the pipeline is operating at capacity, the HHI would be 4,826. *Id.* P 364.

[637] *Id.* P 366.

[638] *Id.* P 367 (Table 5).

[639] *Id.* P 369 (Table 6).

effective capacity was not consistent with Commission precedent. The Presiding Judge rejected the Complainants' proposed HHI of 3,332 based on her finding discussed above that sales over local truck racks were appropriate competitive alternatives in the origin market.[640]

260. The Presiding Judge identified the following HHI figures for the Pittsburgh destination market proposed by the parties:

- Complainants proposed an HHI of 3,272 using Buckeye's 2012 internal estimate of consumption and estimating waterborne deliveries at 24.2 MBPD. Complainants also proposed HHIs of 3,013, using Dr. Schink's 2012 estimate of consumption, and 2,973, using Mr. Siskind's 2013 estimate of consumption.[641]

- Buckeye presented an HHI of 2,210, using Dr. Schink's estimated barge deliveries of 28.9 MBPD.[642]

- Trial Staff offered an HHI of 2,741, using estimated waterborne deliveries of 11.1 MBPD.[643]

261. The Presiding Judge found the HHI to be approximately 2,489, indicating the market is sufficiently competitive. The Presiding Judge's determination was based on her rulings discussed above that adopted Dr. Arthur's geographic definition, Trial Staff's competitive alternatives (including the Warren Refinery), and Dr. Arthur's estimate of waterborne transportation of 24.2 MBPD, and rejected Dr. Schink's calculation of effective capacities. The Presiding Judge relied on Buckeye's argument that if Trial Staff's calculation was revised to include Dr. Arthur's estimate of waterborne deliveries of 24.2 MBPD, the HHI would be 2,489.[644]

262. The Presiding Judge explained that in addition to the HHI calculation, Dr. Arthur calculated delivery-based market shares for the Pittsburgh destination market as a

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[640] *Id.* P 372.

[641] *Id.* P 373 (Table 7).

[642] *Id.* P 380 (Table 8).

[643] *Id.* P 383 (Table 9).

[644] *Id.* P 387.

secondary indicator of whether Buckeye possesses market power.[645] Because Sunoco's Allegheny Access Project commenced service to Pittsburgh in 2015, the Complainants claimed that Buckeye's 2012 delivery-based market share should be used to estimate Buckeye's future market share.[646] The Presiding Judge found the Complainant's argument that Buckeye's 2012 delivery based market share as calculated by Dr. Arthur indicates Buckeye's future market share unpersuasive. The Presiding Judge observed that the record lacked information regarding Sunoco's 2015 reintroduction of service and contained no information on Sunoco's actual deliveries. Further, the Presiding Judge concluded that she was "not persuaded that past market shares are necessarily indicative of future market shares," in light of evidence that Allegheny Access increased Sunoco's capacity to serve Pittsburgh from 70 MBPD pre-shutdown to 85 MBPD and could expand to 110 MBPD in the future.[647]

263. The Presiding Judge found that the calculated HHI for the Harrisburg destination market is between Trial Staff's HHI of 3,588 and Dr. Arthur's HHI of 4,997, indicating the market is highly concentrated.[648] The Presiding Judge based this finding on her prior determinations, discussed above, that trucking from Baltimore and Philadelphia to Harrisburg is not a competitive alternative, and that Berks County should be included in the geographic definition.[649]

264. The Presiding Judge observed that the Complainants offered Dr. Arthur's calculated delivery-based market shares for the Harrisburg destination market as a secondary indicator as to whether Buckeye possesses market power.[650] Trial Staff also argued that Buckeye's delivery-based market shares for the Harrisburg destination market indicated that Buckeye possesses market power.[651]

265. The Presiding Judge accepted the Complainants' calculation of delivery-based market shares for the Harrisburg market, finding that the data was less speculative than

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[645] *Id.* P 376 (citing Complainants' Initial Brief (citing Ex. GP-80 at 110).

[646] *Id.*

[647] *Id.* P 388 (citing Tr. 1132-33).

[648] *Id.* P 403.

[649] *Id.* P 402.

[650] *Id.* P 390 (citing Ex. GP-80 at 113-116).

[651] *Id.* P 391.

the data relied on to calculate Buckeye's market shares for the Pittsburgh market, in part because there were no similar expansion plans. The Presiding Judge concluded that in addition to the high HHI, the delivery-based market shares support a finding that Buckeye possesses market power in the Harrisburg destination market.[652]

266. The Presiding Judge summarized Buckeye's arguments in opposition to the Complainants' and Trial Staff's HHI calculations and delivery-based market share figures.[653] In particular, Buckeye argued that at the time of Opinion No. 360, Buckeye had a high share of deliveries in the Harrisburg market but the Commission found competition from trucks from outside the market rendered the market competitive. The Commission also found that Sunoco lacked significant market power in 2007 despite a high HHI calculation based on competition from trucks from outside the market.[654]

267. The Presiding Judge found Buckeye's arguments based on the original proceeding granting Buckeye's market-based rate authority and the 2007 Sunoco proceeding unpersuasive. The Presiding Judge found that in Opinion No. 360, Trial Staff's witness "calculated the HHI using a different methodology than the effective capacity-based method that is used in market-based rate proceedings today."[655] In fact, the witness "used a much higher threshold price increase when calculating competitive alternatives and market power statistics, such that his results overstate the competitiveness of trucking and understate the HHI."[656] Regarding the 2007 Sunoco proceeding, the Presiding Judge found that Sunoco had only one terminal in Mechanicsburg, in contrast to Buckeye's three terminals with much greater capacity, and that Sunoco's closure of service only increases Buckeye's position in the market.[657] Further, the Presiding Judge stated that "the question of market power is a fact-specific inquiry that should be made on a case-by-case basis."[658]

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[652] *Id.* P 405.

[653] *Id.* PP 392-395, 398-401.

[654] *Id.* P 395.

[655] *Id.* P 404 (citing Tr. 1812).

[656] *Id.*

[657] *Id.* (citing Tr. 2030-31); *Sunoco*, 118 FERC ¶ 61,266; Ex. GP-13.

[658] *Id.*

ii. Briefs on Exceptions[659]

268. On exceptions, the Complainants argue that the Presiding Judge made a material computational error in the HHI calculation of 2,489 for the Pittsburgh destination market.[660] The Complainants assert that the Presiding Judge used Mr. Siskind's HHI calculations, which incorporate Trial Staff's proposed geographic market. However, the Presiding Judge rejected Trial Staff's geographic market and instead adopted Dr. Arthur's geographic market from his rebuttal testimony. The Complainants assert that if the correct geographic market is used, the HHI calculation ranges from 2,612 to 2,954, indicating the Pittsburgh market is concentrated.[661] The Complainants argue that the Presiding Judge should have used Dr. Arthur's HHI calculations as a starting point instead of Mr. Siskind's calculations. According to the Complainants, starting with Dr. Arthur's HHI calculations reflects the geographic market and waterborne volume level adopted by the Presiding Judge, but the Warren Refinery must be added as a competitive alternative. Instead, the Presiding Judge substituted Dr. Arthur's waterborne volume in Mr. Siskand's HHI calculation, which does not use the relevant geographic market accepted by the Presiding Judge.[662]

269. In addition, the Complainants claim that the Presiding Judge erred in rejecting Dr. Arthur's calculation of delivery-based market shares for the Pittsburgh destination market.[663] The Complainants argue that Sunoco's capacity expansion was not designed solely to serve Pittsburgh, and in any event, the added capacity was at most 15 MBPD such that Buckeye's volumes would decrease no more than 15 MBPD relative to Sunoco's prior operations.[664]

270. The Complainants also assert that adopting Dr. Arthur's proposal to rely on the estimate of consumption for the Pittsburgh market contained in Buckeye's internal analysis would result in an HHI of 2,954.[665] The Complainants argue that Buckeye's and

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[659] Arguments on exceptions that are discussed and addressed in the preceding sections will not be restated here.

[660] Complainants Brief on Exceptions at 63-67.

[661] *Id.* at 64-66.

[662] *Id.*

[663] *Id.* at 67-71.

[664] *Id.* at 67-68 (citing Ex. GP-22 at 14).

[665] *Id.* at 70-71. The Complainants note that this estimate uses Dr. Arthur's

Trial Staff's estimates are unrealistically low – at least 18 percent below known actual deliveries in the Pittsburgh market – such that adopting these estimates biases the HHI calculation downward.[666]

271. The Complainants argue that the Presiding Judge failed to consider the fact that Dr. Arthur's estimate of waterborne volumes, which the Presiding Judge correctly adopts, is conservatively high. The Complainants state that Dr. Arthur's waterborne volume of 24.2 MBPD combines actual deliveries to the Port of Pittsburgh (15.5 MBPD) plus the effective capacity that is limited by the total consumption in counties where one specific waterborne terminal was found to be competitive yet there was no data on actual deliveries available (8.7 MBPD), thus overstating actual waterborne deliveries. The Complainants further assert that treating this waterborne volume level as being controlled by multiple entities rather than the terminal owners in Dr. Arthur's HHI calculations (reducing the market share of other alternatives yet providing zero contribution to the HHI statistics) as well as treating the effective capacity as equivalent to actual waterborne deliveries results in conservatively low HHI calculations.[667]

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geographic market definition and Trial Staff's recommended effective capacity for the Warren Refinery.

[666] *Id.* at 70.

[667] *Id.* at 74-75.

272. Buckeye argues on exceptions that the Presiding Judge fails to consider the fact that there has been virtually no change in Buckeye's delivery share in the Harrisburg destination market since Opinion No. 360.[668] Buckeye asserts that in Opinion No. 360, Buckeye was found to have a delivery share in the Harrisburg destination market of above 80 percent, but the Commission found there was sufficient potential competition in the market, particularly from trucks from Baltimore and Philadelphia. Buckeye argues that the Presiding Judge failed to distinguish the current market conditions from those present at the time the Commission decided Opinion No. 360, and instead relies on similar evidence to draw the opposite conclusion. Buckeye argues that the unchanged market share strongly supports reliance on potential truck competition.[669] Buckeye argues that the Presiding Judge's statement that Trial Staff's witness in Opinion No. 360 calculated HHI using a different methodology from the current effective-capacity method does not invalidate the fact that trucking was found to be competitive without specific volume data and the market was found competitive despite the high HHI obtained if trucking competition was not included.[670]

273. In addition, Buckeye argues that the Presiding Judge erred in relying on the shutdown of the Sunoco pipeline to Harrisburg as evidence that a reduction in competition has occurred in the Harrisburg market when the evidence actually demonstrates that there has been no long-term increase in Buckeye's volumes.[671]

iii. Briefs Opposing Exceptions

274. Buckeye argues in its brief opposing exceptions that the Presiding Judge's HHI calculation of 2,489 for the Pittsburgh destination market is the most appropriate based on the record.[672] Buckeye asserts that the Complainants' calculation is not supported by the record as no witness sponsored the calculations.[673] Buckeye also responds to the Complainants' argument that the Presiding Judge should have added the Warren Refinery

[668] Buckeye Brief on Exceptions at 87-88.

[669] *Id.* at 88.

[670] *Id.* at 89.

[671] *Id.* at 94 (citing Tr. 1355-1357, 1362-1365).

[672] Buckeye Brief Opposing Exceptions at 43-44.

[673] *Id.* at 43.

as a competitive alternative in Dr. Arthur's HHI calculation.[674] Buckeye claims that the Complainants' argument effectively concedes that the Complainants' desired HHI calculations are not in the record.[675] Buckeye argues that Figure 2 in Complainants' Brief Opposing Exceptions[676] uses incorrect effective capacity values for the Warren Refinery and the data needed to correct the incorrect values is not in the record.[677] Buckeye asserts that given the fatal errors in Complainants' Figure 2, the Commission should give it no weight.[678] Buckeye argues that Complainants' HHI claims regarding the Pittsburgh destination market reflect other flaws, including Dr. Arthur's inappropriate geographic definition and unreliable estimate of consumption.[679]

275. Buckeye argues that the Presiding Judge properly rejected the Complainants' delivery-based market share calculations for the Pittsburgh destination market and correctly found there was insufficient evidence to deduce Buckeye's market share after the Allegheny Access pipeline commenced service.[680]

276. Buckeye claims that the Presiding Judge used an estimate of consumption for the Pittsburgh destination market that is fully supported by the record and based on reliable, commonly-accepted methods.[681] Buckeye argues that Dr. Arthur's consumption estimate in his rebuttal testimony based on Buckeye's 2012 internal analysis is flawed and lacks credibility.[682] In particular, Buckeye argues that Dr. Arthur failed to update the data and that he had no underlying information on how the estimates were calculated and thus no basis to verify the figures.[683] Buckeye also asserts that the consumption estimate may be

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[674] *Id.* at 44 (citing Complainants Brief on Exceptions at 65-67).

[675] *Id.* at 45.

[676] Complainants Brief on Exceptions at 66.

[677] Buckeye Brief Opposing Exceptions at 44-48.

[678] *Id.* at 48.

[679] *Id.* at 48-50.

[680] *Id.* at 50-54.

[681] *Id.* at 54-56.

[682] *Id.* at 56-62.

[683] *Id.* at 56-59.

for all refined petroleum products instead of only for pipelineable refined petroleum products.[684]

277. Trial Staff's brief opposing exceptions responds to Buckeye's arguments regarding Opinion No. 360 and the Harrisburg destination market.[685] In particular, Trial Staff argues that neither the presiding judge nor the Commission in that proceeding made any explicit findings regarding the Harrisburg destination market.

278. Complainants in their brief opposing exceptions argue that the Presiding Judge properly interpreted the effect of the shutdown of the Sunoco pipeline to Harrisburg, which caused an increase in Buckeye's deliveries. The Complainants assert that the Presiding Judge correctly concluded that Buckeye possesses market power in the Harrisburg destination market based on the high HHI and delivery-based market shares.[686]

iv. Commission Determination

279. The Commission affirms the Presiding Judge's calculation of HHI in the origin market and Harrisburg destination market, as well as the Presiding Judge's rulings regarding Dr. Arthur's delivery-based market shares for the destination markets. The Commission also affirms the Presiding Judge's methodology for calculating HHI for the Pittsburgh destination market. However, we agree with the Complainants that the Presiding Judge's HHI calculation of 2,489 does not accurately reflect the Presiding Judge's findings regarding the Pittsburgh destination market. The Presiding Judge adopted Dr. Arthur's definition of the Pittsburgh geographic market as revised in his rebuttal testimony.[687] Figure 3 in paragraph 284 of the Initial Decision shows the differences between Dr. Arthur's definition of the Pittsburgh market in his direct testimony (the Modified Pittsburgh BEA) and the revised definition in his rebuttal testimony (the Revised Pittsburgh Definition).[688] Dr. Arthur's calculated HHIs for the Pittsburgh market using three different estimates of consumption are shown in Table 7 of

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[684] *Id.* at 59-61.

[685] Trial Staff Brief Opposing Exceptions at 47-50.

[686] Complainants Brief on Exceptions at 60.

[687] Initial Decision, 155 FERC ¶ 63,008 at P 285.

[688] *Id*. P 284 (Figure 3); *see also* Ex. GP-80 at 78.

paragraph 373 of the Initial Decision.[689] Table 7 shows Dr. Arthur's calculated HHIs from his rebuttal testimony, which reflect his Revised Pittsburgh Definition.[690] The estimates of waterborne consumption are slightly different in each calculation, but the first calculation includes the 24.262 MBPD figure that was accepted by the Presiding Judge.[691] Dr. Arthur did not include the Warren Refinery as a competitive alternative. In contrast, Trial Staff witness Mr. Siskind's calculated HHI for Pittsburgh of 2,741 as shown in Table 9 of paragraph 383 includes the Warren Refinery as a competitive alternative.[692] However, Mr. Siskind's estimate of waterborne shipments of 11.084 MBPD was not accepted by the Presiding Judge,[693] and Mr. Siskind's calculated HHI does not use Dr. Arthur's Revised Pittsburgh Definition.[694] Instead, Mr. Siskind's calculation is based on the Modified Pittsburgh BEA used in Dr. Arthur's direct testimony.[695] Table 10 of the Initial Decision revises Mr. Siskind's HHI calculation by substituting Dr. Arthur's 24.262 MBPD estimate for waterborne deliveries, resulting in an HHI of 2,489.[696] This calculation is consistent with the Presiding Judge's findings to the extent it includes the Warren Refinery as a competitive alternative and the 24.262 MBPD estimate of waterborne deliveries. However, this calculation is based on Mr. Siskind's use of the Modified Pittsburgh BEA, instead of the Revised Pittsburgh Definition accepted by the Presiding Judge.[697] The Complainants are correct that the Presiding Judge's calculated HHI for the Pittsburgh market of 2,489 is inconsistent with

[689] Initial Decision, 155 FERC ¶ 63,008 at P 373.

[690] *See* Ex. GP-80 at 103-105; Initial Decision, 155 FERC ¶ 63,008 at P 373 (Table 7); Buckeye Initial Post-Hearing Brief at 72.

[691] Initial Decision, 155 FERC ¶ 63,008 at PP 373, 387.

[692] *Id.* P 383; Ex. S-5 at 57.

[693] *Id.*; Initial Decision, 155 FERC ¶ 63,008 at P 387.

[694] Ex. S-5 at 44-45.

[695] *Id.* at 46.

[696] Initial Decision, 155 FERC ¶ 63,008 at P 386.

[697] Compare Ex. GP-2 at 87 (Figure 5), Ex. S-5 at 57, GP-80 at 105 (Figure 4), and Buckeye Post-Hearing Brief on Exceptions at 79; *see also* Buckeye Brief Opposing Exceptions at 44.

the Presiding Judge's determination of the appropriate geographic market definition for the Pittsburgh market.

280. The Presiding Judge acknowledges that the calculated HHI of 2,489 in Table 10 is "based on a slightly different definition of the Pittsburgh destination market (i.e. Dr. Arthur's 'old' definition) than has been adopted here," but finds that "Dr. Arthur's modification to his definition of the Pittsburgh destination market did not have a material impact on his market power statistics."[698] However, the Commission finds that Dr. Arthur's modification of the relevant geographic market in his rebuttal testimony does affect the market power statistics.[699] Dr. Arthur's modification of the geographic market definition in his rebuttal testimony impacts the effective capacity, market share, and HHI contributions based on the effective capacity in each of the counties included in Dr. Arthur's revised geographic market.

281. The Commission agrees with the Complainants that incorporating the Warren Refinery as a competitive alternative in Dr. Arthur's HHI calculations would result in an HHI calculation that is more consistent with the Presiding Judge's findings. Following this approach, the Complainants revised Dr. Arthur's HHI calculation, resulting in a HHI range of approximately 2,612 to 2,954, as shown in Complainants' Figure 2 below.[700]

Figure 2

HHI Summary for the Pittsburgh Market
Using Three Estimates of Consumption

		Buckeye 2012 Internal Estimate of Consumption			Dr. Schink's 2012 Estimate of Consumption			Mr. Siskind's 2013 Estimate of Consumption		
		Effective Capacity	Market Share	HHI Contribution	Effective Capacity	Market Share	HHI Contribution	Effective Capacity	Market Share	HHI Contribution
		[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]
Buckeye Pipeline	[a]	152,725	41%	1,702	115,761	39%	1,504	107,319	38%	1,466
Sunoco Pipeline	[b]	123,395	33%	1,111	93,620	31%	984	87,087	31%	965
Marathon	[c]	37,004	10%	100	31,624	11%	112	29,065	10%	108
Ergon Refinery	[d]	12,600	3%	12	12,600	4%	18	12,600	4%	20
United Refinery	[e]	20,236	5%	30	20,236	7%	46	20,236	7%	52
Waterborne	[f]	24,262	7%	*	24,643	8%	*	23,963	9%	*
Total		**370,223**	**100%**		**298,484**	**100%**		**280,271**	**100%**	
HHI				**2,954**			**2,664**			**2,612**

Sources/Notes:
Exhibit No. GP-98; with the addition of United Refining Company in Warren, PA as a competitive alternative (ID at PP 386-387).
[f]: Includes 2013 deliveries of 15.5 MBPD into the Port of Pittsburgh plus the effective capacity of terminals outside of Port of Pittsburgh that are capped at the consumption of the counties in which the terminals are competitive.

[698] Initial Decision, 155 FERC ¶ 63,008 at P 387 n.725.

[699] *See* Ex. GP-80 at 103-105; *Compare* Ex. GP-2 at 87 (Figure 5) *with* Ex. GP-80 at 105 (Figure 4).

[700] Complainants Brief on Exceptions at 66 (Figure 2).

282. Although Buckeye acknowledges that the Presiding Judge's 2,489 HHI calculation does not employ Dr. Arthur's Revised Pittsburgh Definition,[701] Buckeye points out that the Complainants' calculation substitutes the same value for the effective capacity of United Refining in all three panels (20.236 MBPD).[702] The 20.236 MBPD figure is the effective capacity estimate of the Warren Refinery from Mr. Siskind's calculated HHI.[703] The Complainants incorporated this figure into Dr. Arthur's HHI calculations, which did not include the Warren Refinery.[704] Buckeye acknowledges that no party in the proceeding presented an HHI calculation that incorporates each of the elements adopted by the Presiding Judge and that the data necessary to determine capacity values for United Refining that are consistent with Dr. Arthur's Revised Pittsburgh Definition is not in the record.[705] The Commission finds that the Complainants' calculated HHI in Figure 2 above of approximately 2,612 to 2,954, which includes the Warren Refinery effective capacity of 20.236 MBPD, is more consistent with the Presiding Judge's findings than the 2,489 calculation. The Commission further finds that the Complainants' revised HHI estimate between 2,612 and 2,954 provides a sufficiently reliable indicator that the market is concentrated.

283. The Commission rejects Buckeye's argument that the Complainants' HHI figure is not supported by the record because no witness sponsored the revised HHI calculation. The Complainants' HHI calculation merely incorporates Mr. Siskind's effective capacity figure for the Warren Refinery in Dr. Arthur's HHI calculation.[706] The data necessary to prepare the revised calculation is in the record and supported by witness testimony. The Commission has authority to make findings that modify the results of the parties' proffered HHI calculations in conducting the market power analysis.[707] To hold

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[701] Buckeye Brief Opposing Exceptions at 43-44.

[702] *Id.* at 44-48.

[703] Initial Decision, 155 FERC ¶ 63,008 at P 383 (Table 9) and P 386 (Table 10).

[704] Complainants Brief on Exceptions at 66.

[705] Buckeye Brief Opposing Exceptions at 44, 48.

[706] *See* Complainants Brief on Exceptions at 66; GP-80 at 105 (Figure 4); S-5 at 57.

[707] *See, e.g.*, *Colonial Pipeline Co.*, 92 FERC ¶ 61,144, at 61,537-61,538 (2000) (The Commission modified the HHI calculation submitted by the pipeline's expert witness to eliminate waterborne sources of supply and recalculated market share and HHI figures for the Baton Rouge, Louisiana destination market.).

otherwise would hinder the Commission in carrying out its duty to conduct a reasonable inquiry evaluating whether Buckeye possesses significant market power in the relevant markets.[708]

11. Potential Competition and Other Factors

a. Initial Decision

284. The Presiding Judge addressed what impact potential competition, exchanges, and other factors have on the market power analysis in each of the geographic markets. Regarding the origin market, Buckeye argued that PBF's actions to pursue potential competitive alternatives constitute evidence of potential competition, including PBF's pursuit of connections with Colonial and Magellan terminals, and its steps to expand dock capacity to offload increased volumes to barges.[709] Trial Staff argued that the potential for self-supply options to move product from PBF's Delaware City Refinery is appropriate to consider and is a strong pro-competitive factor.[710] Trial Staff argued that while the Chelsea Junction origin market is highly concentrated, the evidence does not show that Buckeye possesses significant market power in the Chelsea Junction origin market.[711] The Complainants argued that the evidence does not support a finding that the potential competition has an impact on the market power analysis in the origin market.[712] Buckeye also argued that exchanges play a significant role in its ability to exercise market power in the origin market.[713] The Complainants and Trial Staff disagreed.[714]

285. The Presiding Judge found that the pro-competitive factors of exchanges and self-supply options, including connections to Colonial and Magellan and expansion of dock capacity, are appropriate to consider when evaluating Buckeye's ability to exercise

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[708] *See Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984).

[709] Initial Decision, 155 FERC ¶ 63,008 at PP 406-408.

[710] *Id.* PP 414, 479.

[711] *Id.* PP 478-479.

[712] *Id.* PP 410-413.

[713] *Id.* PP 409, 433, 435, 443.

[714] *Id.* PP 434, 438, 444-448.

significant market power in the origin market, especially in light of the fact that the calculated HHI was a close call.[715]

286. Regarding the Pittsburgh destination market, the Presiding Judge explained that Buckeye argued the market continues to be competitive due to Sunoco's Allegheny Access Project, relying on evidence of a decline in nominations on Buckeye to Pittsburgh following Allegheny Access' commencement of service.[716] The Complainants challenged Buckeye's evidence regarding Allegheny Access.[717] Trial Staff argued that two pro-competitive factors to be considered are the Allegheny Access Project's commencement of service and Buckeye's planned expansion of capacity to serve the Pittsburgh market.[718]

287. In considering the impact of potential competition regarding the Pittsburgh market, the Presiding Judge found that at the time of the hearing, delivery data was not yet available because the Allegheny Access Project had just entered service. Nevertheless, the Presiding Judge found Buckeye's nominations data relevant and concluded that the start of service on the Allegheny Access Project is a pro-competitive factor that further supports a finding that the Pittsburgh destination market is competitive.[719] In considering other factors relevant to the Pittsburgh market, the Presiding Judge found Buckeye's planned expansion to serve Pittsburgh to be another pro-competitive factor.[720]

288. Regarding the Harrisburg destination market, the Presiding Judge rejected Buckeye's arguments regarding evidence of potential competition and other factors, in particular regarding truck deliveries from the Baltimore and Philadelphia markets. The Presiding Judge relied on her prior determination that the evidence shows that trucking is minimal and concluded that trucking is not an appropriate pro-competitive factor to consider, particularly as the HHI calculation strongly indicates the market is highly

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[715] *Id.* PP 415, 449, 452, 481.

[716] *Id.* P 417.

[717] *Id.* P 422.

[718] *Id.* PP 460, 483.

[719] *Id.* PP 423-424, 462.

[720] *Id.* P 462.

concentrated. The Presiding Judge concluded that there are no relevant pro-competitive factors to consider for the Harrisburg destination market.[721]

b. Brief on Exceptions

289. On exceptions, the Complainants argue that the Presiding Judge erred in her findings regarding potential competition in the origin market. The Complainants argue that there is no indicia that the potential alternatives are competitive. The Complainants argue that the potential alternatives may not be good alternatives in terms of price. The Complainants claim that (1) PBF rejected an offer regarding a potential connection with Colonial because the costs for PBF and rate offered by Colonial made the project unprofitable and an alternative that is not attractive at current market conditions is likely not competitive, (2) the potential connection with Magellan would not increase sales into the local market because customers that could be served out of the Wilmington, Delaware terminal could also be served out of PBF's Delaware City Refinery, and (3) the potential modification of dock facilities at the Delaware City Refinery would not increase shipments of refined products by barge, and PBF would be unlikely to shift volumes currently moved by Buckeye to barges.[722]

290. The Complainants argue that the Presiding Judge erroneously found that a decrease in nominations on Buckeye was evidence of competition in the Pittsburgh destination market, as Buckeye's deliveries to Pittsburgh had not declined dramatically as a result of the commencement of service on Sunoco's Allegheny Access project.[723]

291. The Complainants argue that the Presiding Judge erred in finding that the Allegheny Access Project and Buckeye's planned expansion of capacity to Pittsburgh are relevant pro-competitive factors.[724] The Complainants argue that the Allegheny Access Project and Buckeye expansion are reflected in the HHI calculation.[725] The Complainants also argue that a potential expansion by Buckeye does not mitigate market power concerns because even monopolists have an incentive to expand capacity as demand conditions change, and an expansion that serves to further increase Buckeye's

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[721] *Id.* PP 431-432, 474-477.

[722] Complainants Brief on Exceptions at 61-63.

[723] *Id.* at 75-77.

[724] *Id.* at 77-80.

[725] *Id.* at 78-79.

position as the dominant supplier to the Pittsburgh market should not be considered a pro-competitive factor.[726]

c. Briefs Opposing Exceptions

292. Regarding the origin market, Buckeye and Trial Staff argue that the Presiding Judge correctly found that the sources of potential competition are factors that weigh in favor of a competitive finding. Buckeye asserts that sources of potential competition need not be price-justified to the same extent as competitive alternatives that are included in the market concentration calculations.[727] Buckeye argues that the Presiding Judge's conclusions regarding the potential connections with Colonial and Magellan and the expansion of dock capacity are well-supported by the record.[728]

293. In response to the Complainants' claim that the potential alternatives may not be competitive in terms of price, Trial Staff argues that Mr. Siskind explained that the availability of self-supply options would aid in countering Buckeye's attempts to exercise market power in the origin market.[729] In addition, Trial Staff argues that PBF is currently taking steps to implement connections with the Magellan terminal and expand its dock facilities, and PBF's claim that neither project will provide additional economic offtake capacity is based solely on the testimony of PBF company witness, Mr. Gerbman. Trial Staff asserts that there is no evidence showing that PBF could not begin to utilize the project as an alternative to Buckeye.[730]

294. Buckeye and Trial Staff argue that the Presiding Judge correctly determined that the decrease in nominations on Buckeye following the Allegheny Access Project's commencement of service and Buckeye's planned expansion to Pittsburgh are relevant pro-competitive factors in the Pittsburgh destination market.[731] In particular, Buckeye

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[726] *Id.* at 79-80 (citing Ex. GP-80 at 135-140). The Complainants also argue that the degree of competition Buckeye faces in the Pittsburgh destination market may be overstated because the Presiding Judge included the Warren Refinery as a competitive alternative. *Id.* at 78-79. This argument is addressed above in Section 9.

[727] Buckeye Brief Opposing Exceptions at 36-38 (citing *Williams Pipeline Co.*, 58 FERC ¶ 63,004, at 65,017 (1992); *Williams*, Opinion No. 391, 68 FERC at 61,670).

[728] *Id.* at 39.

[729] Trial Staff Brief Opposing Exceptions at 87 (citing Ex. S-5 at 65).

[730] *Id.* at 87-88.

[731] Buckeye Brief Opposing Exceptions at 71-79; Trial Staff Brief Opposing

asserts that the record supports the Initial Decision's conclusions that construction of a major new pipeline competitor that appears to take away significant business from Buckeye in its first month of operation is a pro-competitive factor, and that Buckeye's planned expansion to Pittsburgh to win shipper business indicates that there is significant competition.[732] Trial Staff argues that Sunoco's capacity to serve the Pittsburgh destination market increased by 20 percent as a result of the Allegheny Access Project, and that Sunoco has represented that it may further expand the capacity of the Allegheny Access pipeline from 85 MBPD to 110 MBPD.[733] Trial Staff claims that Buckeye's plans to expand capacity during a time of prorationing are inconsistent with the behavior of a firm possessing significant market power.[734] Buckeye similarly asserts that withholding capacity from a market in order to implement or maintain supracompetitive pricing is a mechanism by which a supplier possessing market power exercises its market power and therefore, Buckeye's plans to increase capacity to the Pittsburgh area suggest Buckeye lacks market power.[735]

d. Commission Determination

295. The Commission affirms the Presiding Judge's findings regarding additional pro-competitive factors in the origin market, but reverses the Presiding Judge's findings regarding certain pro-competitive factors in the Pittsburgh destination market.

296. Pursuant to Order No. 572, potential competition is a relevant and indeed necessary factor to consider when conducting a market power analysis.[736] In addition, a party may demonstrate that other factors bear on the market power analysis such as buyer market power and exchanges.[737] This is true of both an application for market-based rate authority, as well as an investigation of a pipeline that currently charges market-based rates. The Commission agrees with Buckeye that because potential competitors are not included in the market share and market concentration calculations, they need not be

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Exceptions at 81-83.

[732] Buckeye Brief Opposing Exceptions at 73.

[733] Trial Staff Brief Opposing Exceptions at 81 (citing Tr. 1132-1133).

[734] *Id.* at 82.

[735] Buckeye Brief Opposing Exceptions at 75.

[736] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.

[737] *Id.*

cost-justified to the same extent as competitive alternatives that are included in the market calculations.[738] The Presiding Judge properly considered evidence on pro-competitive factors in this proceeding regarding the origin market, and decided those issues correctly.

297. Regarding the Pittsburgh destination market, the Commission agrees with the Complainants that the introduction of Sunoco's Allegheny Access Project and Buckeye's planned expansion are not relevant pro-competitive factors because they are reflected in the HHI calculations.[739] Similar to the concern we have recognized regarding exchanges, the potential for double counting exists where new capacity is included in the HHI calculations and then the project which utilizes that capacity is also considered a mitigating factor.[740] The Commission finds that it is improper to include the Allegheny Access Project as a competitive alternative to Buckeye in the market calculations while concurrently finding that the start of service of the Allegheny Access Project is an additional pro-competitive factor. This includes the Presiding Judge's finding that data regarding the Allegheny Access Project's impact on nominations or deliveries on Buckeye into the Pittsburgh market was relevant evidence of competition. Therefore, the Presiding Judge's finding that the start-up of the Allegheny Access Project was a relevant pro-competitive factor based on the nominations data was in error. The Initial Decision similarly erred in finding that Buckeye's planned expansion to serve the Pittsburgh market was a relevant pro-competitive factor. The Commission finds that where an entity has committed to entering the market in the near future and sufficient data is available regarding the project such that the parties choose to incorporate such data in their analysis of competitive alternatives and market calculations, those projects should not also be considered qualitatively as sources of potential competition or additional pro-competitive factors.

298. As to Trial Staff's argument that Sunoco may expand the capacity of the Allegheny Access Project from 85 MBPD to 110 MBPD,[741] the Commission finds that Sunoco's potential future expansion to 110 MBPD is relevant evidence of potential competition. Unlike the Allegheny Access Project, the prospect of a further expansion of approximately 25 MBPD does not appear to be reflected quantitatively in the market

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[738] Buckeye Brief Opposing Exceptions at 36-38.

[739] *See* Initial Decision, 155 FERC ¶ 63,008 at P 386, Table 10; *id.* at P 388; *see also*, Ex. GP-80 at 105, 141; Ex. GP-98; Ex. GP-104; Ex. S-5 at 59-60; Ex. BPL-67 at 46; Ex. GP-2 at 53.

[740] *Williams*, Opinion No. 391, 68 FERC at 61,673.

[741] Trial Staff Brief Opposing Exceptions at 81 (citing Tr. 1133); *see also*, Initial Decision, 155 FERC ¶ 63,008 at P 388.

power calculations and thus can be considered qualitatively as an additional pro-competitive factor. However, the Commission finds this evidence is entitled to little weight, as the possible expansion would be unlikely to substantially impact market competitiveness. Even if the larger 110 MBPD capacity figure was included in the HHI calculations, the HHI for the Pittsburgh destination market would not be below the 2,500 threshold that usually indicates market competitiveness.

299. The Commission rejects the argument that a pipeline's decision to expand is indicative of the presence of competition in all instances. Any pipeline, including a pipeline with market power, may still face a restraint on price increases due to an inability to charge prices above the basin differential between origin and destination markets. In such instances, excess demand can occur even when a pipeline with market power has maximized its ability to raise its price. To maximize profits, a pipeline with market power that cannot increase price any further may need to expand capacity. Therefore, the Commission will not presume that in all instances a pipeline's decision to expand is by definition an indication of a lack of significant market power.

12. Whether the Complainants and/or Trial Staff Met Their Burden of Proof

a. Initial Decision

300. The Presiding Judge found that the Complainants had not met their burden to show that Buckeye possesses significant market power in the origin market. Although the Presiding Judge's findings regarding the HHI calculation for the origin market indicated that the origin market is concentrated, the Presiding Judge took into account the evidence of other pro-competitive factors, including multiple self-supply options and exchanges.[742] The Presiding Judge also concluded that the Complainants had not met their burden to show that Buckeye possesses significant market power in the Pittsburgh destination market based on the calculated HHI as further supported by the additional pro-competitive factors.[743]

301. The Presiding Judge concluded that the Complainants and Trial Staff met their burden to show that Buckeye possesses significant market power in the Harrisburg destination market as the HHI calculation indicated the market is highly concentrated and

[742] Initial Decision, 155 FERC ¶ 63,008 at P 481.

[743] *Id.* P 486.

the Presiding Judge found no other relevant pro-competitive factors.[744] The Presiding Judge also noted that she defined the Harrisburg market to include Berks County and rejected Buckeye's argument that the Commission could not revoke Buckeye's market-based rates in Berks County, as described above. The Presiding Judge recommended that Buckeye's market-based rate authority for the Harrisburg destination market, including Buckeye's delivery points in Tuckerton and Sinking Spring in Berks County, be revoked.[745]

b. Briefs on Exceptions and Opposing Exceptions

302. The Complainants challenge the Presiding Judge's finding that they have not met their burden to show that Buckeye possesses market power in the origin market and Pittsburgh destination market. Buckeye argues that the Presiding Judge incorrectly concluded that Buckeye can exercise market power in the Harrisburg destination market. Trial Staff asserts that the Presiding Judge correctly found that Buckeye possesses significant market power in the Harrisburg destination market but lacks significant market power in the Pittsburgh destination and Chelsea Junction origin markets.

c. Commission Determination

303. The Commission affirms the Presiding Judge's conclusions that the Complainants and Trial Staff met their burden of proof to show that Buckeye can exercise market power in the Harrisburg destination market, and that the Complainants have not met their burden regarding the origin market. We reverse the Presiding Judge's conclusion that the Complainants have not met their burden regarding the Pittsburgh destination market. The Commission adopted the Complainants' revised HHI estimate of between 2,612 and 2,954 for the Pittsburgh destination market, which indicates that the market is concentrated. In addition, as described above, the Commission finds that the Initial Decision erred in finding the start of service on Sunoco's Allegheny Access Project and Buckeye's planned expansion to serve the Pittsburgh market to be relevant pro-competitive factors regarding the Pittsburgh destination market. These findings support reversing the Initial Decision's determination that the Complainants have not met their burden of proof to show that Buckeye possesses market power in the Pittsburgh destination market. Accordingly, the Commission finds that Buckeye's market-based rate authority for the Pittsburgh destination market should be revoked. The Commission also agrees with the Presiding Judge's recommendation that Buckeye's market-based rate authority for the Harrisburg destination market, including Buckeye's delivery points in Tuckerton and Sinking Spring in Berks County, be revoked.

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[744] *Id.* P 491.

[745] *Id.* P 492.

The Commission orders:

(A) The exceptions to the Initial Decision are resolved as stated in the body of this order; to the extent an exception is not discussed, it should be considered denied.

(B) The Commission hereby revokes Buckeye's market-based rate authority for the Pittsburgh destination market and the Harrisburg destination market, including Buckeye's delivery points in Tuckerton and Sinking Spring in Berks County, effective on the date of issuance of this order. Buckeye is directed to file revised tariff rates for service to Pittsburgh and Harrisburg delivery points pursuant to the methodologies available in Part 342 of the Commission's regulations within 120 days from the date of this order.[746]

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[746] 18 C.F.R. Part 342 (2017).